Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

NEBRASKA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

LINCOLN ELECTRIC SYSTEM, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 47 U.S.C. § 253(a) (2000), which bars any state statute, regulation, or other legal requirement that prohibits "any entity" from providing interstate or intrastate telecommunications service, clearly and manifestly demonstrate Congress' intent to preempt state laws which preclude their own political subdivisions from providing telecommunications services?

PARTIES TO THE PROCEEDING

Petitioner, designated as the "Appellee" before the Nebraska Supreme Court, is the Nebraska Public Service Commission ["Commission" or "NPSC"]. (Appendix ["App."] A-1). The Nebraska Telecommunications Association ["NTA"], a non-profit corporation whose members consist primarily of holders of certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, formally intervened in the proceedings below, and was designated as the "Intervenor-Appellee" before the Nebraska Supreme Court. (App. A-1). Respondent, the Appellant before the Nebraska Supreme Court, is the Lincoln Electric System ["LES"]. (App. A-1).

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OPINIONS BELOW

The opinion of the Supreme Court of Nebraska (App. A-1 through A-24), filed on January 10, 2003, is reported as *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 655 N.W.2d 363 (2003). The Nebraska Supreme Court's order denying NTA's motion for rehearing was entered on February 12, 2003. (App. A-58). Applications to stay issuance of the mandate filed by NTA and the Commission were also overruled on February 12, 2003. (App. A-25 through A-26). The Commission's Order Granting NTA's Motion for Declaratory Ruling, entered on January 9, 2001 (App. A-27 through A-53), and the Commission's order denying the motion for rehearing filed by LES, entered on February 21, 2001 (App. A-54 through A-57), are unreported.

JURISDICTION

The Supreme Court of Nebraska entered its opinion and judgment on January 10, 2003. (App. A-1). The court denied rehearing on February 12, 2003. (App. A-58). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land. . . .

47 U.S.C. § 253(a) (2000):

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Neb. Rev. Stat. § 88-128(1)(b) (Cum. Supp. 2002):

> The commission may only issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and hearing pursuant to commission rules and regulations. The commission shall not issue a certificate or a permit to an agency or political subdivision of the state.

Neb. Rev. Stat. § 86-575(2) (Cum. Supp. 2002):

> No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.

STATEMENT OF THE CASE

On October 4, 2000, Respondent LES, an operating division of the City of Lincoln, a Nebraska municipal

corporation and political subdivision of the State of Nebraska, filed an application with the NPSC seeking a contract carrier permit authorizing LES to provide non-switched digital transmission telecommunications services in and around Lincoln, Nebraska. (App. A-1 through 2, 27). NTA, a non-profit corporation whose members consist primarily of holders of certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, formally intervened in the proceeding initiated by LES. (App. A-3, 28).[1] On November 9, 2000, NTA filed a Motion for Declaratory Ruling requesting that the NPSC find that LES lacked legal authority to provide for-hire telecommunications services or to hold contract carrier permit authority to perform such services. (App. A-3, 28). On January 9, 2001, the NPSC entered an Order Granting NTA's Motion for Declaratory Ruling, concluding that LES did not have legal authority to provide for-hire telecommunications services. (App. A-3, 27 through 53). NPSC concluded that LES lacked such authority because no statute, city charter provision, or city ordinance expressly or implicitly granted LES the power to engage in the business of providing for-hire telecommunications services. (App. A-3, 47). One concurring Commissioner found that

[1] In addition to NTA, numerous other persons or entities intervened before the NPSC in the LES proceeding. (App. A-27 through 28). Petitioner, contemporaneously with the filing of this petition, has filed and served a written notice pursuant to Rule 12.6 advising the Clerk of the Court of Petitioner's belief that these persons or entities, while nominally parties to the proceedings below, have no interest in the outcome of the petition.

the City of Lincoln's home rule charter granted sufficiently broad power to encompass the provision of for-hire telecommunications services, but that the requisite authority had not been delegated to LES through a properly enacted ordinance. (App. A-3, 53). LES filed a motion for rehearing, which was denied by the NPSC on February 21, 2001. (App. A-3, 54-57). LES timely appealed NPSC's decision to the Nebraska Supreme Court. (App. A-3).

While the appeal was pending, the Nebraska Legislature enacted 2001 Neb. Laws, LB 827. (App. A-5). Sections 2 and 19 of LB 827, originally codified at Neb. Rev. Stat. §§ 86-2302(2) and 75-604(5) (Supp. 2001), provided that the NSPC "shall not issue ... a [telecommunications contract carrier] permit ... to an agency or political subdivision of the state" and that "[n]o agency or political subdivision of the state shall provide telecommunications services for a fee ... or be issued ... a permit as a telecommunications contract carrier."[2] In its appellate brief, NTA asserted the enactment of these statutes rendered LES' appeal moot, and NTA moved for summary dismissal. (App. A-5). LES objected to the summary dismissal motion, asserting the statutory provisions barring political subdivisions from obtaining permits as telecommunications contract carriers or providing telecommunications services for a fee were preempted by 47 U.S.C. § 253 (2000) and, thus, unconstitutional under the Supremacy Clause of the

[2] In 2002, § 75-604(5) was transferred without substantive change to Neb. Rev. Stat. § 86-128(1)(b) (Cum. Supp. 2002), and § 86-2302(2) was transferred to Neb. Rev. Stat. § 86-575(2) (Cum. Supp. 2002). 2002 Neb. Laws, LB 1105, §§ 27 and 345. Petitioner, as did the court below, will refer to the current statutes.

U. S. Constitution. (App. A-5).[3] The motion for summary dismissal was overruled. (App. A-6).

In its opinion, the Nebraska Supreme Court noted that, while it overruled NTA's motion for summary dismissal, the mootness issue was ripe for review, stating that "[t]he Nebraska statutory provisions enacted after the Commission's order at issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier." (App. A-6). Thus, the court below concluded that "[u]nless LES is correct in its assertion that these statutory provisions are preempted by federal law, the single issue presented in this appeal would be moot." (App. A-6).

Addressing the preemption issue, the Nebraska Supreme Court acknowledged there is a split of authority on the preemptive effect of § 253(a), noting that, while some courts have held that § 253(a) preempts state statutes which prohibit local governments or political subdivisions from offering telecommunications service (*Missouri Mun. League v. FCC,* 299 F.3d 949 (8th Cir. 2002), *petition for cert. filed Nixon v. Missouri Mun. League,* No. 02-1238 (filed February 18, 2003),[4] *City of Bristol v. Earley,* 145

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[3] As required by Nebraska Sup. Ct. R. of Prac. and Proc. 9E (rev. 2002), LES served a Notice of Constitutional Question on the Nebraska Attorney General along with its briefs asserting the unconstitutionality of the LB 827. Rule 9E allows the Attorney General the opportunity to submit an amicus curiae brief in cases involving the constitutionality of a state statute when the Attorney General is not a party. As noted by the court below, the Attorney General did not file an amicus curiae brief in the proceedings below (App. A-6), as the constitutional question was briefed by NTA.

[4] In addition to the petition pending in *Nixon v. Missouri Mun. League*, two other petitions for a writ of certiorari have been filed

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F. Supp. 2d 741 (W.D. Va. 2001), *vacated,* slip op. (4th Cir. May 1, 2002)), other courts have held that § 253(a) does not preempt state statutes which prohibit the provision of telecommunications service by political subdivisions (*City of Abilene v. FCC,* 164 F.3d 49 (D.C. Cir. 1999), *Iowa Telephone Ass'n v. City of Hawarden,* 589 N.W.2d 245 (Iowa 1999)). (App. A-8 through 12). Stating it was "persuaded by the reasoning of the Eighth Circuit" in *Missouri Mun. League v. FCC,* the court below concluded that "Congress' use of the phrase 'any entity' in § 253(a) [was] indicative of an expansive statutory scope which include[d] a governmental entity, such as a municipally owned utility, seeking to provide telecommunications service . . . ", and, as a result, "by virtue of the Supremacy Clause, §§ 86-128(1)(b) and 86-575(2) [were] preempted by federal law and [were] unconstitutional." (App. A-12).[5]

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seeking review of the Eight Circuit's decision. *FCC v. Missouri Mun. League,* No. 02-1386 (filed March 20, 2003); *Southwestern Bell Tel., L.P. f/k/a Southwestern Bell Tel. Co. v. Missouri Mun. League,* No. 02-1405 (filed March 25, 2003).

[5] After determining that §§ 86-128(1)(b) and 86-575(2) were preempted and thus could not operate to prohibit LES from providing telecommunications services, the court below held that the NPSC erred in finding that Lincoln's home rule charter did not provide legal authority for the city to engage in the provision of for-hire telecommunications services. (App. A-13 through 22). While finding the city had authority to engage in providing telecommunications services, the court held the city had not exercised such authority by adoption of an ordinance delegating this power to LES. (App. A-22 through 24). The court below thus affirmed the NPSC's denial of LES's application. (App. A-24).

REASONS FOR GRANTING THE WRIT

The decision of the Nebraska Supreme Court presents a question of importance to all states relating to their power to control the activities of their political subdivisions. Specifically, the decision raises the significant question of whether Congress, in using the term "any entity" in § 253(a), clearly stated its intent to alter the balance of power between the states and the federal government by preventing states from prohibiting their own political subdivisions from providing telecommunications services. The important issue of whether § 253(a) preempts state statutes which prohibit the provision of telecommunications services by political subdivisions has been decided differently by two federal circuit courts of appeals, as well as the highest courts of two states. The Nebraska Supreme Court's interpretation of the phrase "any entity" in § 253(a) as preempting state laws prohibiting political subdivisions from engaging in the telecommunications business is contrary to decisions of this Court holding that where a federal statute touches on an area traditionally within the states' control, Congress must clearly and manifestly express its intent to alter the usual balance between state and federal powers, and decisions recognizing that the use of a general phrase such as "any entity" does not, without more, provide the type of certainty necessary to demonstrate congressional intent to alter the constitutional balance of such powers. The issue of whether § 253(a) preempts state laws which prohibit political subdivisions from providing telecommunications services presents an important question of federal law which should be finally decided by this Court.

I. THERE IS A CONFLICT AMONG UNITED STATES COURTS OF APPEALS AND STATE COURTS OF LAST RESORT AS TO WHETHER § 253(a) PREEMPTS STATE LAWS WHICH BAR POLITICAL SUBDIVISIONS FROM PROVIDING TELECOMMUNICATIONS SERVICES.

Two United States Courts of Appeals have considered the issue of whether 47 U.S.C. § 253(a) preempts state laws that preclude political subdivisions from providing telecommunications services, and have reached different conclusions on this issue. In *City of Abilene v. FCC,* 164 F.3d 49 (D.C. Cir. 1999) ["*City of Abilene*"], the U. S. Court of Appeals for the D. C. Circuit affirmed a determination by the Federal Communications Commission ["FCC"] that § 253(a) did not preempt a Texas law prohibiting municipalities from providing telecommunications services. The D. C. Circuit "assume[d] *arguendo* that Congress, acting within its constitutional authority, may – through the Supremacy clause – supersede a State law limiting the powers of the State's political subdivisions." *Id.* at 51. It noted that "[w]hatever the scope of congressional authority in this regard, interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty." *Id.* at 52. Because interpreting § 253(a) to "bar[ ] Texas from limiting the entry of its municipalities into the telecommunications business . . . " required finding that "Congress altered the State's governmental structure . . . ", the court determined that, under the principle enunciated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) ["*Gregory*"], § 253(a) could be construed to preempt the Texas law only if Congress "manifested its intention" to control state-local relationships with respect to the provision of telecommunications "with unmistakable clarity." *Id.* (*citing Gregory,* 501 U.S. at 460). The D. C. Circuit concluded that "§ 253 fail[ed] this test . . . ", finding

"it [was] not plain . . . that § 253(a) was meant to include municipalities in the category of 'any entity.'" *Id.* at 52, 54.

The Eighth Circuit recently reached the opposite conclusion in *Missouri Mun. League v. FCC,* 299 F.3d 949 (8th Cir. 2002), *petitions for cert. filed Nixon v. Missouri Mun. League,* No. 02-1238 (filed February 18, 2003), *FCC v. Missouri Mun. League,* No. 02-1386 (filed March 20, 2003), *Southwestern Bell Tel., L.P. f/k/a Southwestern Bell Tel. Co. v. Missouri Mun. League,* No. 02-1405 (filed March 25, 2003) ["*Missouri Mun. League*"]. The issue in that case was whether a Missouri statute which prevented political subdivisions from providing telecommunications services was preempted by § 253(a). While recognizing it was required to apply the "plain statement" rule set forth in *Gregory* to determine if Congress intended the "any entity" language in § 253(a) to "preempt state law where the preemption affect[ed] the traditional sovereignty of the states . . . ", the Eighth Circuit found the statute "plainly require[d] preemption . . . " of the Missouri statute. 299 F.3d at 952-53. The court reasoned that the "plain meaning" of the term "entity" included all businesses or government units, and that "Congress's use of 'any' to modify 'entity' signifie[d] its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54. The Eighth Circuit "conclude[d] that because municipalities fall within the ordinary definition of the term 'entity,' and because Congress gave the term expansive scope by using the modifier 'any,' individual municipalities [were] encompassed within the term 'any entity' as used in § 253(a)." *Id.* at 955.

In addition to the different conclusions reached by the D. C. Circuit and the Eighth Circuit on the issue of whether § 253(a) preempts state laws prohibiting political subdivisions from providing telecommunications services,

two state courts of last resort have also split on this issue. In the instant case, the Nebraska Supreme Court held that Nebraska's statutes prohibiting political subdivisions from providing telecommunications services for hire were preempted by § 253(a). Relying largely on the Eighth Circuit's decision in *Missouri Mun. League*, the Nebraska Supreme Court concluded that "Congress' use of the phrase 'any entity' in § 253(a) [was] indicative of an expansive statutory scope which include[d] a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services." (App. A-12). Yet the Iowa Supreme Court reached precisely the opposite conclusion in *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999). The Iowa court noted its obligation to follow the "plain statement" rule in *Gregory* that "courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so." *Id.* at 251 (*citing Gregory,* 502 U.S. at 460). Agreeing with the D. C. Circuit's conclusion in *City of Abilene* "that Congress's intent 'to include municipalities in the category 'any entity' was not plain as required under *Gregory* . . . '", the Iowa Supreme Court held that § 253(a) did "not prevent the State of Iowa from prohibiting the offering of local telephone service by its political subdivisions." *Id.* at 252 (*quoting City of Abilene v. FCC,* 164 F.3d at 54).[6]

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[6] Two other courts have considered whether § 253(a) preempts state statutes prohibiting political subdivisions from providing telecommunications services. In *City of Bristol v. Earley,* 145 F. Supp. 2d 741, 747 (W.D. Va. 2001), *vacated,* slip op. (4th Cir. May 1, 2002), the federal district court held a Virginia statute which prohibited localities from providing telecommunications services was preempted, concluding

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The decisional conflict between these courts regarding the preemptive effect of § 253(a) on state statutes which bar political subdivisions from engaging in the telecommunications business should be resolved by this Court. These conflicting interpretations result in the inconsistent application of federal law among affected states, and promote uncertainty in an area where clarity is needed.[7] This conflict warrants this Court's review.

"that the broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be 'entities' within the meaning of the Telecommunications Act." The Georgia Court of Appeals reached a contrary conclusion in *Municipal Elec. Auth. of Ga. v. Georgia Pub. Serv. Comm'n*, 241 Ga. App. 237, 242, 525 S.E.2d 399, 403 (1999), agreeing with the D. C. Circuit's decision in *City of Abilene* in holding "that Congress did not clearly intend to include public corporations within the definition of 'entity' . . . " in § 253(a), and that, "[w]ithout such a clear expression of congressional intent, the Federal Telecommunications Act [did] not preempt" Georgia law.

[7] Statutory prohibitions or restrictions on the authority of political subdivisions to engage in providing telecommunications have been enacted by other states. *E.g.* Ark. Code Ann. § 23-17-409(b) (2002); Nev. Rev. Stat. § 268.086 (2001); Tenn. Code Ann. § 7-52-601 (Michie Supp. 2002); *see generally* Kathryn A. Tongue, Comment, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 Nw. U. L. Rev. 1099, 1129-1135 (2001). While the constitutionality of these statutes has not been raised, the danger of further inconsistent judicial interpretation exists if the Court does not definitively interpret the scope of § 253(a).

II. THE DECISION OF THE NEBRASKA SUPREME COURT THAT § 253(a) PREEMPTS STATE LAWS WHICH BAR POLITICAL SUBDIVISIONS FROM PROVIDING TELECOMMUNICATIONS SERVICES IS CONTRARY TO DECISIONS OF THIS COURT.

The United States "Constitution establishes a system of dual sovereignty between the States and the Federal Government . . . ", and "[t]he States . . . retain substantial sovereign authority under our constitutional system." *Gregory,* 501 U.S. at 457. The Supremacy Clause gives the Federal Government "a decided advantage" in the "delicate balance" between state and federal power. *Id.* at 460. "Congress may legislate in areas traditionally regulated by the States." *Id.* "This is an extraordinary power in a federalist system . . . ", one which the Court "must assume Congress does not exercise lightly." *Id.*

The Court has consistently followed the principle that congressional intent "to alter the 'usual constitutional balance between the States and the Federal Government . . . " will be found only if Congress has made "its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65 (1989) ["*Will*"] (*quoting Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985)). "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will*, 491 U.S. at 65 (*quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). "The plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory,* 501 U.S. at 461.

The Court has long recognized that "[p]olitical subdivisions of States-counties, cities, or whatever . . . have been traditionally regarded as subordinate governmental instrumentalities created by the States to assist in the carrying out of state governmental functions." *Reynolds v. Sims,* 377 U.S. 533, 575 (1964). "[T]hese governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) . . . rests in the absolute discretion of the state.'" *Id.* (*quoting Hunter v. Pittsburgh,* 207 U.S. 161, 178 (1907)). "Whether and how to use that discretion is a question central to state self-government." *City of Columbus v. Ours Garage and Wrecker Service, Inc.,* 536 U.S. 424, ___, 122 S. Ct. 2226, 2234, 153 L. Ed. 2d 430, ___ (2002). The Court has further acknowledged "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 71 (1978).

"[I]nterfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty." *City of Abilene,* 164 F.3d at 52. In view of the "absolute discretion" States possess to control the activities of their political subdivisions, there is no question that interpreting the term "any entity" in § 253(a) to include political subdivisions would alter the constitutional balance of power between the states and the federal government. The court below mistakenly concluded that Congress' intent to preclude states from prohibiting their political subdivisions from providing telecommunications services was "unmistakably clear" because the term "any entity" was "indicative of an expansive statutory scope

which includes a government entity. . . ." (App. A-12). This conclusion is contrary to decisions of this Court holding that general language such as the term "any entity" in § 253(a) does not suffice to establish the "clear and manifest" intent of Congress required to alter the balance between state and federal powers.

In *Will*, the Court considered whether a state or official of a state sued in their official capacity was a "person" within the meaning of 42 U.S.C. § 1983. 491 U.S. at 60. Section 1983 broadly states that "[e]very person" who, under color of State law, deprives a person of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." The Court in *Will* nevertheless rejected the contention that the term "person" could be construed to include a state, concluding: "The language of § 1983 . . . falls short of satisfying the ordinary rule of statutory construction" that congressional intent to alter the balance of power between the states and the federal government must be "'unmistakably clear in the language of the statute.'" *Id.* at 65 (*quoting Atascadero State Hosp. v. Scanlon,* 473 U.S. at 242)). Further, while noting that "state officials literally are persons . . . ", the Court further held that, since a "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . ", "[i]t is no different from a suit against the State itself." *Will,* 491 U.S. at 71 (citation omitted). Thus, despite the broad language in § 1983 providing a cause of action against "every person" depriving a person's rights under the federal Constitution and statutes, the Court concluded "that neither a State

nor its officials acting in their official capacities are 'persons' under § 1983." *Id.*

In reaching this conclusion in *Will*, the Court referenced its earlier opinion in *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234 (1985) ["*Atascadero*"]. One of the issues addressed in *Atascadero* was whether a provision in the Rehabilitation Act (29 U.S.C. § 794a) providing civil remedies to persons aggrieved by actions or failures to act by "any recipient of Federal assistance" was sufficient to override the State of California's Eleventh Amendment immunity, as the State was a "recipient of federal aid" under the statute. *Id.* at 244-46. The Court determined the general reference to "any recipient of Federal assistance" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment . . . ", stating that "[w]hen Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Id.* at 246.

Most recently, in *Raygor v. Regents of the University of Minnesota,* 534 U.S. 533 (2002) ["*Raygor*"], the Court considered whether the provisions of 28 U.S.C. § 1367(d) tolling the statute of limitations for state law claims brought in federal court under the grant of supplemental jurisdiction in § 1367 applied to claims against nonconsenting state defendants in federal court which were dismissed on Eleventh Amendment grounds. The statute of limitations at issue provided:

> The period of limitations for *any claim* asserted under subsection (a), and for *any other claim* in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while

> the claim is pending and for a period of 30 days after it is dismissed. . . .

28 U.S.C. § 1367(d) (emphasis added). The supplemental jurisdiction provisions of § 1367(a) broadly referred to "all other claims" related to claims brought under the federal court's original jurisdiction. 28 U.S.C. § 1367(a).

The petitioners in *Raygor* originally brought a federal claim under the Age Discrimination in Employment Act and a state law discrimination action under the supplemental jurisdictional statute, § 1367(a), against the University of Minnesota Board of Regents. *Raygor,* 534 U.S. at 537. The federal district court granted the University's motion to dismiss their claims on Eleventh Amendment grounds. *Id.* Petitioners then refiled their state law claims in state court, asserting the provisions of § 1367(d) operated to toll the statute of limitations on their state law claims. *Id.* at 538. The Minnesota district court found that § 1367(d) did not apply because the federal district court never had jurisdiction over the claim. *Id.* The Minnesota Court of Appeals reversed, concluding that § 1367(d) tolled Petitioners' state law claims. *Id.* at 539. The Minnesota Supreme Court reversed the Court of Appeals, concluding § 1367(d) could not constitutionally apply to toll petitioners' state law claims, as such a construction would impermissibly denigrate the University's Eleventh Amendment immunity. *Id.*

Granting certiorari to review "the question whether 28 U.S.C. § 1367(d) is unconstitutional as applied to a state defendant . . . ", the Court held that the statute did "not toll the period of limitations for state law claims asserted against nonconsenting state defendants that are

dismissed on Eleventh Amendment grounds." *Id.* at 542, 548. The Court noted that "[o]n its face subsection (d) purport[ed] to apply to dismissals of '*any* claim asserted under subsection (a) . . . '", and thus "could be broadly read to apply to any claim technically 'asserted' under subsection (a) as long as it was later dismissed, regardless of the reason for dismissal." *Id.* at 542 (emphasis in original). "[R]eading subsection (d) to apply when state law claims against nonconsenting States [were] dismissed on Eleventh Amendment grounds . . . ", however, "raise[d] serious doubts about the constitutionality of the provision given principles of state sovereign immunity." *Id.*

The Court recognized that resort to the "clear statement principle of statutory construction" applied in *Will* and *Gregory* was warranted in construing § 1367(d) because "allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States. . . . " *Id.* at 544. While acknowledging the facially broad nature of the language in § 1367(d) referring to "any claim" asserted under § 1367(a), the Court found that § 1367(d) did not satisfy the "clear statement principle":

> The question then is whether § 1367(d) states a clear intent to toll the limitations period for claims against nonconsenting States that are dismissed on Eleventh Amendment grounds. Here the lack of clarity is apparent in two respects. With respect to the *claims* the tolling provision covers, one could read § 1367(d) to cover any claim 'asserted' under subsection (a), but we have previously found similar general

> language insufficient to satisfy clear statement requirements.

Id. at 544-45 (emphasis in original).

The "similar language" referred to by the Court in *Raygor* was the statute construed in *Atascadero* providing for civil remedies in federal court for violations of the Rehabilitation Act committed by "'any recipient of federal assistance' . . . ", which the Court found was "'not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment' even when it was undisputed that a state defendant was a recipient of federal aid." *Raygor,* 534 U.S. at 545 (*quoting Atascadero*, 473 U.S. at 245-46). The Court thus concluded that "§ 1367(d) reflect[ed] no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States. . . . " *Id.* at 545.

There is no question that construing § 253(a) to prohibit states from determining the scope of permissible activities of their own political subdivisions by barring their entry into the field of telecommunications significantly impacts the states' sovereign power to control the actions of their own creations. The Nebraska Supreme Court erred in finding that the phrase "any entity" supplies the "unmistakably clear" language required to alter the constitutional balance of powers between the state and federal governments required by this Court's precedents. As demonstrated by the Court's decisions in *Will, Atascadero,* and, most recently, *Raygor*, something more than the use of general language, such as the phrase "any entity", is necessary to support a finding that Congress has "clearly" and "manifestly" expressed its intent to preempt the states in the exercise of their historic power to establish the

confines and parameters of the activities of their own political subdivisions. The Nebraska Supreme Court's misapplication of the "clear statement" principle and this Court's precedents merits review.

III. WHETHER § 253(a) PREEMPTS STATE LAWS WHICH PROHIBIT POLITICAL SUBDIVISIONS FROM PROVIDING TELECOMMUNICATIONS SERVICES PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

The power of a state to establish the powers of its own political subdivisions "is a decision of the most fundamental sort for [the state as] a sovereign entity." *Gregory,* 501 U.S. at 460. The ability of a state to control the activities of the subordinate governmental units it creates impacts "the structure of [the state's] government . . . ", by which "a State defines itself as a sovereign." *Id.* The issue of whether Congress, by providing that state or local laws which prevent "any entity" from providing telecommunications services, has clearly and manifestly expressed an intent to deprive the states of their ability to exercise their sovereign power to control the activities engaged in by their own political subdivisions presents an important question of federal law which should be decided by this Court.

Both federal and state courts have reached differing conclusions regarding the preemptive effect of § 253(a) on state laws prohibiting political subdivisions from engaging in the telecommunications business. This decisional conflict means the answer to this important question will be different depending on which judicial decision controls

in a particular state. The issue of the power of states to prohibit their political subdivisions from providing telecommunications services is one which should, as a matter of national policy, be addressed by the Court to ensure consistent and uniform treatment in all states. If the Court does not grant review and decide this issue, the important goal of assuring uniform application of federal law will not be achieved.

CONCLUSION

The petition for a writ of certiorari to the Nebraska Supreme Court should be granted. Further, in light of the identity of the issue presented by the petition in this case and the question presented in three other cases pending before the Court (*Nixon v. Missouri Mun. League,* No. 02-1238, *FCC v. Missouri Mun. League,* No. 02-1386, and *Southwestern Bell Tel., L.P. f/k/a Southwestern Bell Tel. Co. v. Missouri Mun. League,* No. 02-1405), Petitioner suggests that, in the event that the Court grants review in these cases, the petition should be granted and this case

consolidated with the *Missouri Mun. League* cases for briefing and oral argument on the merits.

Respectfully submitted,

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NEBRASKA SUPREME COURT

IN RE APPLICATION OF LINCOLN ELECTRIC SYSTEM.
LINCOLN ELECTRIC SYSTEM, LINCOLN, APPELLANT, V.
NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, AND
NEBRASKA TELECOMMUNICATIONS ASSOCIATION ET AL.,
INTERVENORS-APPELLEES.

___N.W.2d___

Filed January 10, 2003. No. S-01-286.

Appeal from the Nebraska Public Service Commission. Affirmed.

William F. Austin, of Erickson & Sederstrom, P.C., Douglas L. Curry, of Lincoln Electric System, Lincoln, and Mark J. Ayotte, of Briggs and Morgan, P.A., for appellant.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, Lincoln, for intervenor-appellee Nebraska Telecommunications Association.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an appeal of an order of the Nebraska Public Service Commission (Commission) dismissing an application for contract carrier permit authority filed by Lincoln Electric System (LES). LES appeals, arguing the Commission erred in determining that LES lacked legal authority to provide contract carrier telecommunications services.

I. PROCEDURAL HISTORY

LES is an operating division of the city of Lincoln, a Nebraska municipal corporation and political subdivision

of the State of Nebraska. On October 4, 2000, LES filed an application and request for authority with the Commission, seeking a contract carrier permit authorizing LES to provide competitive access transport services. In its application, LES sought authority to operate as a switchless facilities-based provider of dedicated digital information transmission services over its fiber optic network facilities to and from customer user points.

The application identifies LES as a citizen-owned electric utility serving a 190-square mile area surrounding the city of Lincoln. It states that LES provides electrical service to approximately 111,000 metered customers and also engages in wholesale power and energy transactions, including buying from and selling to other regional public utilities. According to the application, LES owns and maintains extensive fiber optic facilities located throughout its authorized electric service area, which are used to meet LES' telecommunications needs through the interconnection of its operations center, generation stations, and substations. LES sought contract carrier permit authority to allow it

> to fully utilize its existing fiber optic system for the benefit of the Lincoln area by making these facilities available on a non-exclusive basis to provide digital transmission to and from user points within its requested geographic service area, including services to other licensed telecommunications carriers as a provider of competitive access services.

LES stated in its application that its proposed telecommunications services would not make use of the local or interexchange public switched telephone network and that it expected the proposed service to be "used primarily by

business customers and governmental entities to meet their telecommunications needs."

The Nebraska Telecommunications Association (NTA) formally intervened in the matter. On November 9, 2000, the NTA filed a motion for declaratory relief alleging that LES lacked the legal authority to perform for-hire telecommunications services or to hold a contract carrier permit to perform such services. A hearing on the motion was held on December 11, 2000. On January 9, 2001, the Commission entered an order concluding that LES did not have legal authority to provide for-hire telecommunications services. The Commission reasoned that no statute gave LES the requisite authority and that Lincoln's home rule charter, strictly construed, contained no express grant of such authority. One concurring commissioner found that the city had the requisite authority pursuant to its home rule charter, but had not delegated such authority to LES. After its motion for rehearing was denied, LES filed this timely appeal.

II. ASSIGNMENTS OF ERROR

LES assigns that the Commission erred in (1) concluding that the charter of the city of Lincoln does not authorize the city to offer for-hire telecommunications services when such activity is not in contravention of any applicable constitutional or statutory provision; (2) applying a rule of strict construction, referred to as "Dillon's rule," to the limitation of powers charter under which the city of Lincoln currently operates and from which it derives its primary authority; (3) declaring that Neb. Rev. Stat. § 15-201 (Reissue 1997) does not permit the city of Lincoln to provide for-hire telecommunications services; and (4)

concluding that the city of Lincoln does not have the inherent authority to make the efficient business judgment of offering its unused fiber optic capacity for telecommunications purposes when it is engaged in the proprietary function of operating an electric utility.

III. STANDARD OF REVIEW

The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. *In re Proposed Amend. to Title 291,* 264 Neb. 298, 646 N.W.2d 650 (2002); *In re Application No. C-1889,* 264 Neb. 167, 647 N.W.2d 45 (2002). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Application of Neb. Pub. Serv. Comm.,* 260 Neb. 780, 619 N.W.2d 809 (2000).

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.,* 263 Neb. 544, 641 N.W.2d 55 (2002); *Gernstein v. Lake,* 259 Neb. 479, 610 N.W.2d 714 (2000).

IV. ANALYSIS

1. MOOTNESS AND PREEMPTION

The question of law presented by this appeal is whether the Commission erred in determining that LES lacked the legal authority to operate as a for-hire telecommunications carrier. During the pendency of this appeal, the Nebraska Legislature enacted 2001 Neb. Laws, L.B. 827. Certain sections of this bill, originally codified at Neb. Rev. Stat. §§ 75-604(5) and 86-2302(2) (Supp. 2001), became effective on September 1, 2001. These statutes provided that the Commission "shall not issue . . . a permit . . . to an agency or political subdivision of the state" and that "[n]o agency or political subdivision of the state shall provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier." §§ 75-604(5) and 86-2302(2). We note that 2002 Neb. Laws, L.B. 1105, transfers § 75-604(5) to Neb. Rev. Stat. § 86-128(1)(b) (Cum. Supp. 2002), operative January 1, 2003, without substantive change. In addition, 2002 Neb. Laws, L.B. 1105, transfers § 86-2302(2) to Neb. Rev. Stat. § 86-575(2) (Cum. Supp. 2002), operative January 1, 2003, also without substantive change. Due to this recodification, we refer to the current statutes, rather than the statutes referenced by the parties. In its appellate brief and in a subsequently filed motion for summary dismissal, NTA asserted that the enactment of these statutory provisions rendered the issue presented by this appeal moot. LES filed an objection to the motion for summary dismissal and supporting brief in which it asserted that the pertinent provisions of L.B. 827 are preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253 (2000), and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. LES also addressed this

issue in its reply brief, filed a separate "Notice of Constitutional Question," and served copies of its briefs assigning the unconstitutionality of L.B. 827 pursuant to Neb. Ct. R. of Prac. 9E (rev. 2000). The Attorney General has not entered an appearance or filed a brief on this issue.

Although we overruled the motion for summary dismissal, the mootness issue has now been fully briefed and is before us. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Chambers v. Lautenbaugh,* 263 Neb. 920, 644 N.W.2d 540 (2002); *Wilcox v. City of McCook,* 262 Neb. 696, 634 N.W.2d 486 (2001). The Nebraska statutory provisions enacted after the Commission's order at issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier. Unless LES is correct in its assertion that these statutory provisions are preempted by federal law, the single issue presented in this appeal would be moot. We therefore address the preemption issue.

The federal statute upon which LES bases its preemption argument provides in part:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.
>
> **(b) State regulatory authority**
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements

> necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> **(c) State and local government authority**
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(Emphasis supplied.) 47 U.S.C. § 253. Federal courts interpreting the statute generally hold that subsection (a) imposes a substantive limitation on state and local governments, while subsections (b) and (c) are "safe harbors" or exceptions to the general prohibition stated in subsection (a). See, *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002); *New Jersey Payphone Ass'n v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002); *BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002), citing U.S. Const. art. VI, cl. 2. There are three varieties of preemption: express, implied, and conflict preemption. *Id.* Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has

expressly declared an intent to preempt state law. *Id.* LES contends that express preemption arises from the plain language of 47 U.S.C. § 253(a) because it is an "entity" which Congress has determined may not be prohibited by the state from providing telecommunications services. Thus, it contends that §§ 86-128(1)(b) and 86-575(2) are preempted and unconstitutional. On the other hand, NTA argues that under rules governing federal statutory construction, the phrase "any entity" in 47 U.S.C. § 253(a) does not include municipalities which are traditionally subject to the overriding control of state legislatures, and thus the Nebraska statutes are not preempted. Both arguments are supported by case law.

NTA relies upon *City of Abilene, Texas v. F.C.C.,* 164 F.3d 49 (D.C. Cir. 1999), in which the U.S. Court of Appeals for the District of Columbia Circuit upheld a determination by the Federal Communications Commission (FCC) that § 253(a) did not preempt a Texas statute forbidding municipalities from providing telecommunications services. In its analysis, the court determined that § 253(a) must be construed in accordance with the precept enunciated in *Gregory v. Ashcroft,* 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), because "[t]o claim . . . that § 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that Congress altered the State's governmental structure." *City of Abilene, Texas,* 164 F.3d at 52. The precept of *Gregory, supra,* requires that if Congress intends to alter the usual constitutional balance between a state and its municipalities, it must make its intention ""unmistakenly clear"" in the language of the statute. *Gregory,* 501 U.S. at 460, quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (specific

holding superseded by statute). In *City of Abilene, Texas,* the court concluded that there was no such clarity in § 253(a), reasoning that the term "'entity'" was not defined in the Telecommunications Act. 164 F.3d at 52. Noting that it was linguistically possible to include a municipality under the heading "entity," the court found that it was not enough under the *Gregory* standard that the statute *could* bear such meaning. *City of Abilene, Texas, supra.* Instead, the court focused on the fact that there was no textual evidence to suggest that Congress, in using the word "entity," deliberated over the effect such use would have on state-local governmental relationships. *Id.* Noting that *Gregory* requires construction of a statute in favor of state sovereignty when the text fails to indicate congressional intent to the contrary, the court held that § 253(a) did not preempt the Texas statutes. *City of Abilene, Texas, supra.*

A similar conclusion was reached by the Iowa Supreme Court in *Iowa Telephone Ass'n v. City of Hawarden,* 589 N.W.2d 245 (Iowa 1999). In that case, the court began its analysis with the "plain-statement rule" derived from *Gregory, supra,* that "the courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so." *City of Hawarden,* 589 N.W.2d at 251. Relying on the decision of the FCC in *City of Abilene, Texas* (which was affirmed on appeal by the D.C. Circuit Court as discussed above), the Iowa court held without significant additional analysis that § 253(a) did not prevent the State of Iowa from regulating the provision of telecommunications services by its political subdivisions.

Subsequent to the decisions in *City of Abilene, Texas, supra,* and *City of Hawarden, supra,* two courts have reached the opposite conclusion. In *City of Bristol, VA. v. Earley,* 145 F. Supp. 2d 741 (W.D. Va. 2001), a municipality sought a declaratory judgment that a Virginia statute prohibiting local governmental entities from offering telecommunications services to the general public was preempted by § 253(a). The court acknowledged that the challenged law related to the relationship between states and their political subdivisions, an area traditionally regulated by states. It also affirmed the principle that when a federal statute touches on an area traditionally within the exclusive control of states, Congress must make its intention to preempt "'clear and manifest'" based on *Gregory v. Ashcroft,* 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). *Earley,* 145 F. Supp. 2d at 747. However, guided by Supreme Court decisions holding that the use of the modifier "any" denoted an unambiguous legislative intent to impart an expansive scope to a statutory term, the district court determined that Congress' use of the phrase "'any entity'" made it "'clear and manifest'" that § 253(a) was intended to have sweeping application, including application in those areas in which states traditionally enjoyed exclusive regulatory power. 145 F. Supp. at 747, citing *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and *United States v. Gonzales,* 520 U.S. 1, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997). On this basis, the court held that the Virginia statute was preempted by § 253(a) and therefore invalid and unenforceable under the Supremacy Clause.

In *Missouri Mun. League v. F.C.C.,* 299 F.3d 949 (8th Cir. 2002), released after the instant case was argued and submitted, the U.S. Court of Appeals for the Eighth

Circuit employed similar reasoning to conclude that a Missouri statute which prevented municipalities and municipally owned utilities from providing telecommunications services or facilities was preempted by § 253(a). In vacating an FCC order which relied heavily upon *City of Abilene, Texas v. F.C.C.,* 164 F.3d 49 (D.C. Cir. 1999), the court acknowledged its responsibility under *Gregory, supra,* to determine whether the statutory language plainly requires preemption. Focusing on the phrase " 'any entity,' " the court determined that the plain meaning of the term " 'entity' " included all business or governmental organizations, including municipalities. *Missouri Mun. League,* 299 F.3d at 953. Noting that "[t]ime and time again the Court has held that the modifier 'any' prohibits a narrowing construction of a statute," *id.* at 954, the court concluded that "Congress's use of [the term] 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54, citing, inter alia, *Gonzales, supra,* and *Salinas, supra.* Specifically rejecting the reasoning of *City of Abilene, Texas,* the court in *Missouri Mun. League* stated:

> The court, however, made no mention of the Supreme Court's cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress's "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. [Citation omitted.] . . . Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here.

299 F.3d at 955. The court therefore concluded that municipalities are included within the phrase "any entity" as used in § 253(a).

Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law. *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990); *Preister v. Madison County,* 258 Neb. 775, 606 N.W.2d 756 (2000). The Supreme Court has not addressed the specific preemption issue before us, and in the absence of an interpretation of § 253(a) by the Court, we are not bound by any circuit court's interpretation. See *In re Search Warrant for 3628 V. St.,* 262 Neb. 77, 628 N.W.2d 272 (2001). See, also, *Lockart v. Fretwell,* 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) (state courts bound by Supreme Court's interpretation of federal law, but not bound by circuit court's interpretation); *Bromley v. Crisp,* 561 F.2d 1351 (10th Cir. 1977) (state courts may express differing views on federal questions until guided by binding decision of Supreme Court). Here, we are persuaded by the reasoning of the Eighth Circuit that under the rule of statutory construction applied by the Supreme Court in *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and other cases, Congress' use of the phrase "any entity" in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services. We conclude that §§ 86-128(1)(b) and 86-575(2) are absolute prohibitions which, as a matter of law, do not fall within the "safe harbor" provisions in § 253(b) and (c). Therefore, by virtue of the Supremacy Clause, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are unconstitutional.

2. Authority to Operate as Telecommunications Carrier

Having concluded that LES is not *prohibited* by state law from seeking a certificate of public convenience and necessity to operate as a telecommunications carrier, we must now consider whether it is *authorized* to do so.

(a) Statutory Authority

LES assigns that the Commission erred in declaring that § 15-201 does not permit the city of Lincoln to provide for-hire telecommunications services. This assignment, however, is not argued in the brief filed by LES. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos,* 262 Neb. 961, 637 N.W.2d 351 (2002); *Nicholson v. General Cas. Co. of Wis.,* 262 Neb. 879, 636 N.W.2d 372 (2001).

(b) Charter Authority of City of Lincoln

LES also contends that the home rule charter of the city of Lincoln confers authority on LES to provide for-hire telecommunications services. This charter was adopted in 1917 pursuant to article XI, § 2, of the Constitution of the State of Nebraska. This provision of our constitution, adopted in 1912, permits a city having a population of more than 5,000 to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Neb. Const. art. XI, § 2.

A charter defining powers and duties is essential to the creation and existence of a municipal corporation. 2A Eugene McQuillin, The Law of Municipal Corporations § 9.01 (3d ed. 1996). Historically, states were viewed as

possessing all powers necessary for the protection of the general public, and thus a municipality or local city government could exercise only those powers specifically granted to it by the sovereign state. See *id.* A legislature's grant of powers to a municipality is often referred to as a "legislative charter." See *id.*, § 9.07 at 177. Legislative grants of power are strictly construed pursuant to what has become known as Dillon's rule, which provides:

> "[A] municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable."

Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 69-70, 189 N.W. 643, 650 (1922).

In 1875, the home rule charter was originated by the constitution of Missouri. 2A McQuillin, *supra,* § 9.08. Other states, including Nebraska, adopted similar state constitutional provisions allowing for the adoption of home rule charters. See Neb. Const. art. XI, § 2. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. *Mollner v. City of Omaha,* 169 Neb. 44, 98 N.W.2d 33 (1959); 2A McQuillin, *supra,* § 9.08. Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs. See *id.* While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. See *id.* While legislative charters are always

grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. 2A McQuillin, *supra.*

As noted, the Nebraska Constitution authorized the city of Lincoln to adopt a home rule charter. Neb. Const. art. XI, § 2. The question of the nature and extent of the power granted to the electorate of a city by this constitutional provision was addressed by this court in *Consumers Coal Co., supra.* In that case, the plaintiff argued that there was no legal authority permitting the city to operate a public market for the purchase and sale of coal and wood. After examining the language of the Nebraska Constitution authorizing the adoption of home rule charters, we stated:

> We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks.

(Emphasis in original.) *Consumers Coal Co.,* 109 Neb. at 58-59, 189 N.W. at 646. We further held that "it was within the competency of the electorate of the city of Lincoln to adopt a charter which under settled principles of construction would be a limitation as distinguished from a grant of power." *Id.* at 66, 189 N.W. at 649. To determine what the people of the City of Lincoln did "'with the sovereignty acquired by the adoption of a home rule charter,'" we held that it was necessary to examine the

particular charter adopted in order to determine its effect. *Id.* A similar analysis is necessary in the instant case.

At the time *Consumers Coal Co.* was decided in 1922, article II, § 1, of the Lincoln Charter provided that "'[w]ithout denial or disparagement of other powers held under the Constitution and laws of the state, the city of Lincoln shall have the right and power'" to perform specifically enumerated functions. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 67, 189 N.W. 643, 649 (1922). Based upon this language, we concluded that the charter was within that class of home rule charters that are construed to be grants of power, rather than limitations of power. As such, it was subject to the same principle of strict construction that was applicable to legislative grants of municipal charters. Finding no express grant of power authorizing the city to operate a private coal and wood market in the charter language, we concluded that the city lacked the authority to do so.

Article II of the Lincoln Charter, as amended in 1992, is significantly different. It provides in relevant part:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that now are, or hereafter may be,

> granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.

Lincoln Charter, art. II, § 1, approved by voters on May 12, 1992. Unlike the 1922 charter, the broad language in this current charter does not merely enumerate specified powers, but, rather, grants all powers possible to the city. We conclude that the present charter is a limitation of powers charter, not a grant of powers charter. As such, the rule of strict construction, or Dillon's rule, does not apply, and the Commission erred in examining the charter language for an express or implied grant of power. See, *Consumers Coal Co., supra;* 2A Eugene McQuillin, The Law of Municipal Corporations § 9.08 (3d ed. 1996). To determine whether the city of Lincoln possesses the requisite power to operate as a for-hire telecommunications carrier, we need only consider whether the charter's broad authorization to engage in municipal powers and functions encompasses the provision of for-hire telecommunications services.

(c) Is Provision of Proposed Services a Municipal Power?

NTA contends that the charter grants the city only "strictly municipal" powers. Brief for appellee at 31. It argues that the provision of for-hire telecommunications does not fall within this definition and is therefore precluded. LES, in contrast, argues that the limitation of powers charter grants the city all powers "'which might lawfully be delegated to the municipality by the legislature.'" Brief for appellant at 26. Because the Legislature could confer authority to engage in for-hire telecommunications upon the city, LES contends that it, as an operating

division of the city, necessarily possesses that authority. We conclude that NTA's interpretation of the powers granted by a limitation of powers charter is too narrow, while LES' is too broad.

NTA's contention that a limitation of powers charter grants a city authority in only matters of "strictly municipal" concern is based upon a misinterpretation of our prior law and a mischaracterization of the legal issue presented in this case. NTA relies upon cases interpreting the "subject to the constitution and laws of this state" language in Neb. Const. art. XI, § 2. This language requires that a provision of a home rule charter must yield to a conflicting state statute, unless the provision relates to a matter of "strictly municipal" concern. E.g., *Jacobberger v. Terry,* 211 Neb. 878, 320 N.W.2d 903 (1982). Contrary to NTA's assertions, however, this analysis does not mean that a home rule city may act in only those areas that are "strictly municipal." Instead, such an entity may act in all matters necessary or incidental to its government, although municipal action will take precedence over conflicting state action only if the matter is one of strictly local concern. See, *id.; Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N.W. 643 (1922).

NTA also misconstrues the legal issue present in the instant case. It contends that the state's regulation of telecommunications services through the Commission necessarily establishes that this is an area of statewide concern and that a municipality therefore cannot, pursuant to its home rule charter, act in a conflicting manner. This rationale would be applicable if LES was attempting to *regulate* the telecommunications field. However, the issue in this case is whether LES has the legal authority to *provide* for-hire telecommunications services pursuant

to the Lincoln home rule charter. In the instant case, there is no question that if LES may lawfully provide the services, it is subject to regulation by the Commission. Compare *Omaha & C.B. Street R. Co. v. City of Omaha,* 125 Neb. 825, 252 N.W. 407 (1934) (holding home rule charter did not authorize city to regulate bus service contrary to state regulation). There is no conflict between state law and the charter in this case, and therefore the "strictly municipal" analysis is inapplicable.

LES' interpretation of the powers granted by a limitation of powers charter in Nebraska is incorrect because in *Consumers Coal Co.,* we recognized that such a charter adopted pursuant to the Nebraska Constitution does not grant "unlimited" power to a city. Quoting *State ex rel. v. Telephone Co.,* [sic] 189 Mo. 83, 88 S.W. 41 (1905), we held:

> "But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the general assembly, *because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality;* yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. *The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of*

> *the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves.*"

(Emphasis supplied.) *Consumers Coal Co.,* 109 Neb. at 57, 189 N.W. at 645. Thus, the city may exercise every power "*connected with the proper and efficient government of the municipality, including those powers so connected,* which might lawfully be delegated to it by the legislature, without waiting for such delegation." (Emphasis supplied.) *Id.* at 58-59, 189 N.W. at 646. See, *Michelson v. City of Grand Island,* 154 Neb. 654, 48 N.W.2d 769 (1951); *Axberg v. City of Lincoln,* 141 Neb. 55, 2 N.W.2d 613 (1942). Pursuant to the "for its own government" limitation in our constitution, see article XI, § 2, the question is not whether the Legislature could have delegated the authority to provide for-hire telecommunications services to the city of Lincoln. Rather, the question is whether the provision of for-hire telecommunications services is an area that is necessary, incidental, or connected with the proper and efficient government of the municipality of the city of Lincoln.

As we noted in *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 58, 189 N.W. 643, 646 (1922), resolution of this question is difficult for "[i]t is not easy in all cases to distinguish between municipal powers and state powers. . . . " Due to the difficult nature of the question, we must "content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve." *Id.*

Our precedent indicates that a city's provision of retail services can be necessary or incidental to its proper and efficient government. This is particularly true in those circumstances where retail services are directly related to

the provision of a public service. In *Consumers Coal Co.*, we impliedly held that the operation of a public market for the sale of wood and coal by the city was necessary or incidental to the proper and efficient government of the city. Four years later, we reached a similar conclusion in *Standard Oil Co. v. City of Lincoln,* 114 Neb. 243, 207 N.W. 172 (1926). In that case, an amendment to the Lincoln home rule charter expressly granted the city the power to engage in the business of selling gasoline and oil to the inhabitants of the city. The constitutionality of the amendment was challenged by a local business on the ground, inter alia, that the sale of gasoline and oil by the city "'is not of, and does not pertain to, the government of said defendant city.'" *Id.* at 246, 207 N.W. at 173. We rejected the plaintiff's argument, noting that the use of the commodity of gasoline had so steadily increased that it was "well-nigh universal" and that thus, its provision by the city was for a public purpose. *Id.* at 251, 207 N.W. at 175. We held that the charter provision delegated power to the city so that it "may do that which the state may do." *Id.* at 252, 207 N.W. at 176.

Consideration of our precedent and the dictates of logic lead us to conclude that the provision of for-hire telecommunications services by the city of Lincoln is incidental to or connected with its powers of municipal government granted under its limitation of powers charter. Although the charter does not grant the city authority to do all that the state could do, provision of for-hire telecommunications, much like the provision of gasoline, serves a public purpose that is sufficiently related to the government of the municipality of the city of Lincoln. See *Standard Oil Co., supra.* The city seeks to provide telecommunications services by making efficient use of the

facilities it already uses to provide public utilities, thus providing a further connection between the provision of for-hire telecommunications services and the necessary and incidental powers of municipal government. See, also, *Speidell Monuments v. Wyuka Cemetery,* 242 Neb. 134, 493 N.W.2d 336 (1992) (finding cemetery organized as public corporation had implied power to sell grave markers and monuments); *Nelson-Johnston & Doudna v. Metropolitan Utilities District,* 137 Neb. 871, 291 N.W. 558 (1940) (finding metropolitan utilities district empowered to engage in business of supplying water and gas had implied authority to sell gas appliances).

Based upon the foregoing, the Commission erred as a matter of law in determining that the city of Lincoln lacked the legal authority to engage in the provision of for-hire telecommunications services.

3. Authority of LES

The remaining question is whether the city of Lincoln has properly delegated its authority to provide for-hire telecommunications services to LES. LES is an operating division of the city of Lincoln. The Lincoln City Council gives LES all of its powers and responsibilities by ordinance. According to Lincoln Mun. Code § 4.24 (2001), LES is governed by the LES administrative board. Section 4.24.060 of the code sets forth the general powers and duties of the administrative board and provides in pertinent part: "The Lincoln Electric System Administrative Board shall have general control of the Lincoln Electric System of the City of Lincoln including the responsibility for the control and management of the property, personnel, facilities, equipment, and finances of said Lincoln Electric

System." Section 4.24.070, which addresses the specific powers and duties granted to the board, further states: "The Board shall . . . (e) Do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of the ordinance."

LES argues that "[i]nherent in these provisions is the Administrative Board's mandate to maximize the use of all of LES's resources in order to efficiently manage its property and finances." Brief for appellant at 29. LES contends that productive use of its unused fiber optic network falls within this mandate and that thus, the city council has authorized LES to engage in for-hire telecommunications services.

We disagree. LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area in its capacity as a public utility. To the extent management of LES facilities and property relates to the provision of electric service, the city has delegated such authority to the LES board. However, use of LES' facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city. This is especially true because the ordinance gives the LES board the power to perform all acts *necessary* to the efficient operation of the electric system. The record does not reflect that the use of excess fiber optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated

authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services.

V. CONCLUSION

For the foregoing reasons, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. The current Lincoln home rule charter is a limitation of powers charter, and the Commission erred in applying a rule of strict construction to such charter. The Commission further erred as a matter of law in finding that the city of Lincoln lacked the legal authority to provide for-hire telecommunications services. However, because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application. We therefore affirm the denial of the application on grounds other than those relied upon by the Commission majority.

Affirmed.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
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2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

February 12, 2003

~~Jon C. Bruning~~
ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-01-000286, In re Application of LES, Lincoln v. Ne Cable Communications Assn.

Mot Appellee PSC Stay Issuance Mandate **filed** 01/30/03

has been reviewed by the court and the following order entered:

Overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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February 12, 2003

~~Jon C. Bruning~~
ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-01-000286, In re Application of LES, Lincoln v. Ne Cable Communications Assn.

Mot Appellee to Stay Issuance Mandate **filed** 01/24/03

has been reviewed by the court and the following order entered:

Overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

SECRETARY'S RECORD,
NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of Lincoln Electric System, Lincoln, seeking contract carrier permit authority.	Application No. C-2400 ORDER GRANTING NTA'S MOTION FOR DECLARATORY RULING Entered: January 9, 2001

BY THE COMMISSION:

By its application filed October 4, 2000, Lincoln Electric System (LES or Applicant) of Lincoln, Nebraska, seeks contract carrier permit authority. Notice of the application appeared in *The Daily Record*, Omaha, Nebraska on October 5, 2000, pursuant to the rules of the Commission.

Formal interventions were filed by Aliant Communications Co., d/b/a Alltel; Arlington Telephone Company; AT&T; Blair Telephone Company; Clarks Telecommunications Co.; Citizens Telecommunications Company of Nebraska; Cox Nebraska Telcom, LLC; Curtis Telephone Company, Inc.; Dalton Telephone Company, Inc.; Diller Telephone Company; Eastern Nebraska Telephone Company; Elsie Communications, Inc.; Eustis Telephone Exchange, Inc.; Hamilton Telephone Company; Hartington Telecommunications Co., Inc.; Henderson Cooperative Telephone; Hershey Cooperative Telephone Company; Hooper Telephone Company; Home Telephone Company of Nebraska; K&M Telephone Company, Inc.; Keystone-Arthur

Telephone Company; Nebraska Central Telephone Company; Nebraska Telecommunications Association; Northeast Nebraska Telephone Company; NT&T; Pierce Telephone Company, Inc.; Qwest Corporation; Rock County Telephone Company; Stanton Telecom, Inc.; Southeast Nebraska Telephone Company and UtiliCorp Communications Services, Inc. (collectively, Intervenors). Formal protests were filed by Time Warner Cable Nebraska Division and the Nebraska Cable Communications Association. Letters in support were filed by Pacific Media, LLC; Pacific Engineering, Inc. and RWK, Inc.

On November 9, 2000, Nebraska Telecommunications Association (NTA) submitted a Motion for Declaratory Ruling challenging LES' legal authority to provide for-hire telecommunications services in the state of Nebraska. NTA's motion asks the Commission to declare as a matter of law that the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services because it lacks the required legal authority.

A hearing on the NTA motion was held December 11, 2000, in the Commission Hearing Room. Attorneys Jack L. Shultz and Gregory D. Barton appeared on behalf of the NTA. Attorneys Mark J. Ayotte and Douglas L. Curry appeared on behalf of LES. Each party presented their respective arguments on NTA's Motion for Declaratory Ruling, and the matter was submitted for decision by the Commission at the conclusion of the December 11, 2000, oral arguments.

FACTUAL BACKGROUND

NTA is a non-profit corporation organized under the laws of Nebraska, with offices located in Lincoln, Nebraska. A majority of NTA's members hold certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, at various locations throughout the state of Nebraska.

LES is an operating division of the City of Lincoln, a Nebraska municipal corporation and political subdivision of the state of Nebraska. LES filed an application, seeking authority from this Commission to provide non-switched digital transmission telecommunications services in and around Lincoln, Nebraska, as a contract carrier. In its application, LES asserted that it possesses authority to provide contract carrier telecommunications services pursuant to *Neb. Rev. Stat.* § 15-201(6) and the Lincoln City Charter.

NTA formally intervened in this case to oppose the LES application. NTA contends that LES is a municipal corporation and political subdivision of the state which lacks the legal capacity to provide for-hire contract carrier telecommunications services.

DISCUSSION

In support of its Motion for Declaratory Ruling, NTA contends that LES does not have the legal authority to provide for-hire contract carrier telecommunications services because: (1) there is no express statutory grant of such authority; and (2) the "general welfare" powers conferred by the City of Lincoln's home rule charter grant

only strictly municipal powers which can readily be overridden by state law.

LES countered by stating that the City of Lincoln has primary authority granted under its home rule charter to exercise any municipal power, function, right, privilege or immunity that is possible for it to have, independent of any other statutory authority.

In analyzing the powers exercisable by a municipality in Nebraska, there are a number of relevant rules which generally fall within the rubric of "Dillon's Rule." Under "Dillon's Rule," municipal corporations, like LES, "are purely entities of legislative creation" and, "[u]nlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power." *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961). *See also, Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998) (affirming trial court's invalidation of county zoning action under "well-settled rule" that a municipal corporation "possesses, and can exercise, the following powers, *and no others*: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation – *not simply convenient*, but indispensable") (emphasis added); *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980) (the "rule has long been established in this state that a municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of the municipality"); and *United*

Community Services v. Omaha Nat. Banks [sic], 162 Neb. 786, 77 N.W.2d. 576 (1956) (public power district lacked power to make charitable pledges because companies "chartered for the purpose of supplying the public with electricity . . . have such lawful rights and powers as are clearly and expressly granted, together with such implied . . . powers as are reasonably . . . necessary to enable them to exercise those expressly conferred" and "*[a]ll rights and powers not thus granted are withheld*") (Emphasis added).

In order to determine whether LES has the legal capacity to provide for-hire contract carrier telecommunications services, it is necessary to review statutes governing cities of the "primary class," and local charter provisions and ordinances, to determine whether any such provision gives LES the express or necessarily implied authority to engage in for-hire contract carrier telecommunications services. In engaging in this review, it is important to keep in mind the long-standing rule of statutory construction that "[s]tatutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant." *Briar West, Inc.*, 206 Neb. at 176, 291 N.W.2d at 732.

The relevant statutory authority upon which LES relies is set forth in *Neb. Rev. Stat.* § 15-201 (Reissue 1997), which provides in pertinent part:

> Cities of the primary class shall be bodies corporate and politic and shall have power:
>
> . . .
>
> (6) To purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and facilities

> within and without the limits of the city . . . and *to exercise such* other and further powers as may be necessary or incident or appropriate to the powers of such city, including powers granted by the Constitution of Nebraska or exercised by or pursuant to a home rule charter adopted pursuant thereto. . . .

At first blush, one may be tempted to conclude that the power granted in § 15-201(6), to "operate public service and public utility property and facilities," authorizes LES to provide telecommunications services. However, there is an elementary distinction between acting as a "public utility" and acting as a "private enterprise." *See, e.g., In Re Application No. 30466*, 194 Neb. 55, 230 N.W.2d 190 (1975) (a "public utility is obligated to serve *all* its ratepayers fairly and without undue discrimination" because "[c]orporations which devote their property to a public use *may not pick and choose*, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions") (emphasis added). *Accord*, Black's Law Dictionary 1108-1109 (5th Ed. 1979) (defining term "public utility" as meaning an "[a]gency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is, which is *not limited or restricted to any particular class of the community*," and the "devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately") (emphasis added).

Since LES is seeking "contract" carrier authority, under which LES would not be authorized to serve the community at large, by definition, LES' application requests

authority to act as a telecommunications "private enterprise" service, and *not* as a telecommunications "public utility" service.[1] Thus, the power granted in *Neb. Rev. Stat.* § 15-201(6) (Reissue 1997), to "operate public service and public utility property and facilities," only grants LES the power to act as a "public utility, and clearly does not authorize LES to operate a telecommunications "private enterprise" service.

At pages 10-11, 18, 21, 24 and 26 of its brief, LES makes the argument that the Nebraska Legislature specifically authorized LES to provide for-hire telecommunications services because the *definition* of the term "telecommunications company" is statutorily-defined to mean, among other things, a "governmental entity" which offers "telecommunications service for a fee in Nebraska intrastate commerce." *Neb. Rev. Stat.* § 86-802(16). However, it is clear to the Commission that there is nothing in this statutory *definition* which purports to grant legal authority to any public or private entity to engage in for-hire telecommunications services in Nebraska intrastate commerce. It is equally clear to this Commission that the provisions of *Neb. Rev. Stat.* § 86-802(16) merely define and recognize that a telecommunications company can take many forms. Section 86-802(16) does not specifically authorize LES (or any other public or private entity) to

[1] In fact, LES has expressly disclaimed any interest in serving the community at large, stating that, "[w]hile it is true LES provides electric service as a public utility, there is no requirement that it also provide telecommunications services as a common carrier." (LES' brief, at p. 18). LES has thus recognized the basic distinction between serving as a "public utility" and serving as a "retail entity," and LES does not seek to provide service as a public utility under its Application.

provide for-hire telecommunications services.[2] Unlike LES, some political subdivisions, such as counties, are expressly authorized to establish public telephone systems. *See*, *Neb. Rev. Stat.* §§ 86-401 to 86-412. The City of Lincoln/LES has no similar express statutory authorization.

The final potential source of authority for Lincoln/LES is the Lincoln Home Rule Charter. However, it is elementary that the provisions of a municipality's home rule charter are subject to, and must be consistent with, the Constitution and laws of Nebraska. *See, e.g., Retired City Gov. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977). Further, "when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains." *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

The general powers granted to the City of Lincoln are set forth in Article II, §1 of the Charter, which provides in relevant part:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that it is possible

---

[2] LES' invocation of the Commission's Rule requiring any "person, firm, partnership, . . . corporation, cooperative, *political subdivision*, or association" to first make application for and receive authority from the commission before offering any telecommunications service, *see*, NEB. ADMIN. CODE, Title 291, Ch. 5, §002.49A (emphasis added), is misplaced.. In adopting §002.49A, this Commission was merely recognizing the obvious – that a telecommunications company can take many legal forms.

> for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution, or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.
>
> The city shall have the right and power to make such ordinances, by-laws, rules, and regulations, except as prohibited by the state constitution or restricted by this charter, as may be necessary or expedient for maintaining the peace, good government, and welfare of the city, its trade, commerce and manufacturing, and for preserving order, securing persons or property from violence, danger, and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort, morals, and general interests and welfare of the inhabitants of the city and to enforce all such ordinances by providing for the fine or imprisonment, or both the fine and imprisonment, of those convicted of violations thereof.

The ordinances establishing LES's Administrative Board and delineating that Board's powers are located in Chapter 24 of the Lincoln Municipal Code. Under *Lincoln Mun. Code* § 4.24.010, the Board "is assigned the responsibility for the control and management of the property,

personnel, facilities and equipment, and finances of the Lincoln Electric System." *See also, Lincoln Mun. Code* § 4.24.060 (power to appoint chief executive, manager and other employees "as maybe necessary for the efficient and economical management of the said electric system"). The Board's specific "powers and duties" are set forth in *Lincoln Mun. Code* § 4.24.070, under which the Board has the power to:

> (b) Purchase and contract for all materials, parts, services, supplies, and equipment required by Lincoln Electric System . . .
>
> . . .
>
> (e) Do and perform all other acts necessary to maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of this ordinance . . .

As the foregoing demonstrates, there is no statute, charter provision[3] or ordinance which expressly grants to LES the power to engage in the for-hire telecommunications business. The closest any of these legislative acts come to granting such authority is the power to "purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and

---

[3] LES claims that the power to operate a public utility electric system translates into an additional power to provide for-hire telecommunications services. There is no basis to imply a power to provide contract carrier telecommunications service from an expressly granted power to operate a public utility electric system.

facilities within and without the limits of the city," set forth in *Neb. Rev. Stat.* § 15-201(6).

However, as discussed above, there is a fundamental difference between the power to establish a telecommunications public utility and the power to enter that field as a private enterprise. That is precisely the conclusion reached by the Nebraska Supreme Court in the factually, comparable *Consumers' Coal Co.* case. There, a private retail fuel business brought an action to enjoin the City of Lincoln from operating a fuel yard "for the purpose of purchasing coal and wood at remote points of supply, having it shipped to the city of Lincoln and sold at retail to the inhabitants thereof." *Consumers' Coal Co.*, 109 Neb. at 53, 189 N.W. at 644. The trial court sustained the City's demurrer and the plaintiff retail fuel business appealed.

On appeal, the City claimed it had authority to operate a retail fuel yard pursuant to a state statute and a City charter provision. The statutory provision at issue granted the City the power to "establish and maintain a heating and lighting system for such city." The charter provision relied upon by the City, what was then Section 11, Article VIII, granted the City the "power to purchase, construct and otherwise acquire, own, and operate gas and electric plants and properties for the purpose of supplying the city and the inhabitants thereof with such service and utilities, and to purchase, lease, construct and otherwise acquire, own, and operate . . . telephone plants, lines and systems, and any and all other public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities." *Id.* Based upon these statutory and charter provisions, the City argued on appeal that, since the power to furnish heat was expressly granted to the City, the general grant

of legislative power in Article 1, Section II of the Charter delegated to the council the discretion to determine the means or method of supplying the heat.

The *Consumers' Coal Co.* court rejected the City's appellate arguments, for reasons which are controlling in this case:

> . . . So we have to inquire whether or not the provisions of the charter prescribed the mode in which the power to furnish heat to the inhabitants of the city shall be exercised; and it seems to us clear that the method is provided for by Section 11, art. 8, of the charter, in the words "construct and otherwise acquire, own and operate gas and electric plants and property for the manufacture and distribution of gas, heat and electricity, for the purpose of supplying the city and the inhabitants thereof with such service and utilities;" and this provision is followed by authority to purchase "appliances, equipment and machinery necessary or incident to the proper operation and maintenance of such public service plants and properties," and a large number of similar provisions all referring to "such public service plants or properties." The central thought conveyed by this language is the establishment of a plant for the distribution of heat in the same manner or by the same method as had been in use for many years in the furnishing of water and light to the inhabitants of the city, namely, by the establishment of a central plant from which the public service was distributed. *The language used contains no hint of any purpose of the people to grant to the city, to be exercised by its legislative body, the authority to enter into fields of private enterprise and into a business which had always theretofore been carried*

on by private individuals to the greater or less satisfaction of the public. To imply such a power from the language used would be to attribute to it a significance away beyond the general acceptation of the import of the terms. *Implied powers, as the words themselves indicate, must find their justification and foundation in express power granted; that is, they are only implied ex necessitate that the express powers may be fully and completely exercised.* The argument being that such powers must have been within the contemplation of the granting authority, as otherwise those expressly granted could not be carried out. No doubt the power is implied to establish a municipal coal and wood-yard for the purpose of supplying the plant for the distribution of heat; but *this power differs essentially from a power to buy fuel and sell it to the inhabitants of the city in the ordinary course of trade.*

. . .

While it is true that the constitutional provision granting all cities the right to form their charters for their own government should be liberally construed in order that the beneficent intention thereof may be fully carried out . . . , *when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains.*

. . .

"The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and exercise of the power must be confined within the general principles of the law applicable to such subjects."

. . .

> We conclude that the establishment of a municipal fuel yard for the purchase and sale of fuel at retail to the inhabitants of the city of Lincoln is not within the power granted to the city council, and that the ordinance in question is invalid. The case is reversed and remanded to the district court for Lancaster County, with instructions to enter a decree perpetually enjoining the defendants from conducting a fuel business under the said ordinance.

Consumers' Coal Co., 109 Neb. at 73-76, 189 N.W. at 652-653 (emphasis added).

At page 5 of its brief, LES attempts to distinguish the *Consumers' Coal Co.* case, claiming the "general welfare clause" of the City of Lincoln's Charter is "certainly broad enough to include the authority to provide for-hire telecommunications services" because, according to LES, this "general welfare clause" provides Lincoln/LES with "nearly unlimited power." LES does not explain why or how a "general welfare clause" of a city charter could be construed as either expressly or implicitly permitting a division of the City of Lincoln to engage in for-profit retail activities. The Nebraska Supreme Court's decision in the *Consumers' Coal Co.* case is instructive on this point:

> We do not understand it to be claimed that the ordinance in question is referable to the general welfare section of the charter. *To bring it within the police power to which this section refers, some public emergency would have to be shown*, such as a coal famine, or monopoly, whereby the "government might be able to obtain fuel, when citizens generally could not. . . ." No such emergency is suggested.

Consumers' Coal Co., 109 Neb, at 75, 189 N.W. at 652 (emphasis added) (citation omitted).

In accordance with Consumers' Coal Co., LES' reference to the "general welfare section of the charter," as a source of legal authority must be rejected. "To bring [LES Resolution 2000-10] within the police power to which this section refers, some public emergency would have to be shown," and "[n]o such emergency is suggested." *See, Consumers' Coal Co.*, 109 Neb. at 75, 189 N.W. at 652.

LES' attempt to distinguish the *Consumers' Coal Co.* case is based upon the premise that a home rule charter, which is a "limitation" as opposed to a "grant" of power, gives the city "nearly unlimited power." (LES's brief, at p. 5). This is not the law of Nebraska. On the contrary, the Nebraska Supreme Court has held on numerous occasions that a home rule charter confers upon a city a *strictly municipal power* which can readily be overridden by state law. *See, e.g., City of Millard v. City of Omaha*, 185 Neb. 617, 177 N.W.2d 576 (1970) (fact that city has a home rule charter "does not mean that it may not be rendered nugatory by the exercise of state law dealing with other than strictly municipal concerns" and quoting the *Consumers Coal Co.* case for the proposition that the court was and is "thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than a police power, and a strictly municipal power"); *State ex rel. City of Grand Island v. Johnson*, 175 Neb. 498, 122 N.W.2d 240 (1963) ("[w]here the Legislature has enacted a law affecting municipal affairs, but which is of statewide

concern, such law takes precedence over the provisions of a home rule charter"); *Michaelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951) ("[w]hen the Legislature has enacted a law affecting municipal affairs, but which [is] also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield"); and *In re Curtailment of Bus Service*, 125 Neb. 825, 252 N.W. 407 (1934) ("upon such subjects as pertain to state affairs as distinguished strictly from municipal affairs, the provisions of the State Constitution and the general laws of the state are as applicable in a home rule municipality as they are elsewhere in the state").

It is clear that LES' desire to engage in for-hire telecommunications services, both within and beyond the territorial limits of the City of Lincoln, gives rise to matters of statewide, rather than strictly municipal, concerns. This conclusion is fully supported by the Nebraska Supreme Court's decision in the *In re Curtailment of Bus Service* case. There, this Commission granted the application of a municipal street railway company to curtail bus service in Omaha. Omaha appealed, claiming that, as a home rule city, Omaha could force the re-institution of those bus services, regardless of what the Commission said. The Nebraska Supreme Court rejected this argument, reasoning:

> Mass transportation of passengers by common carriers within the state is, and ought to be considered, under our existing Constitution and laws, a matter of state concern. It would be anomalous to commit to a regulatory body, created by the Constitution, jurisdiction over intrastate steam railroads carrying passengers for hire everywhere within the state boundaries and

> to deny that jurisdiction over a carrier operating within a home rule charter municipality.

In re Curtailment of Bus Services, 125 Neb. at ___, 252 NW. at 409.

This Commission has been empowered to regulate both intrastate telecommunications and transportation common and contract carriers, respectively. *See, Neb. Rev. Stat.* § 75-604 and *Neb. Rev. Stat.* § 75-309. Application of the *In re Curtailment of Bus Services* Court's reasoning demonstrates that the City of Lincoln's home rule status has no impact on the "legal authority" analysis because the provision of telecommunications services for-hire, either as a common carrier or as a contract carrier, is a matter of statewide concern. *See, Neb. Rev. Stat.* §§ 86-801 *et seq*. The provision of telecommunications services "by common [and contract] carriers within the state is, and ought to be considered, under our existing Constitution. and laws, a matter of state concern." *See, In re Curtailment of Bus Services*, 125 Neb. at ___, 252 NW. at 409. "It would be anomalous to commit to [this] regulatory body, created by the Constitution, jurisdiction over intrastate [telecommunications carriers] for hire everywhere within the state boundaries and to deny that jurisdiction over a carrier operating within a home rule charter municipality." *See, Id.*

While we obviously are not addressing a "jurisdictional" issue in this case, the fact that the provision of telecommunications services for-hire in Nebraska is a "subject[ ] as pertain[s] to state affairs as distinguished from strictly municipal affairs," means that "the general laws of the state are as applicable in a home room municipality," like Lincoln/LES, "as they are elsewhere in the

state." *See, Id.* Thus, because resort must be had to state law to resolve the "legal authority" issue, the strictures of "Dillon's Rule," as construed and applied by the Nebraska Supreme Court in the *Consumers' Coal Co.* case, are fully in play.

The reasoning of the *Consumers' Coal Co.* Court is, therefore, directly applicable to the "LES legal authority" issue in this case. Indeed, the statutory grant of the power to "purchase, construct, and otherwise acquire, own, maintain and operate public service and public utility property," in *Neb. Rev. Stat.* § 15-201(6), is "virtually identical to the grant of "power to purchase, construct, and otherwise acquire, own and operate . . . any and all . . . public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities," in former Section 11, Article VIII, of the Lincoln Charter, which was at issue in the *Consumers' Coal Co.* case.

Like the charter section in *Consumers, Coal Co.*, in this case, the statutory "language used" in § 15-201(6) "contains no hint of any purpose of the [Legislature] to grant to the city, to be exercised by its legislative body," or by its LES Administrative Board, "the authority to enter into fields of private enterprise and into a business," like for-hire telecommunications, "which ha[s] always theretofore been carried on by private individuals to the greater or less satisfaction of the public." *See, Consumers' Coal Co.*, 109 Neb. at 74, 189 N.W. at 652. Nor is there any basis to imply such a power from the language used in § 15-201(6). Such an implication would "attribute to [§ 15-201(6)'s language] a significance away beyond the general acceptation of the import of the terms." *See, Consumers' Coal Co.*, 109 Neb. at 74, 189 N.W. at 652.

"No doubt the power is implied to establish a municipal" communications system "for the purpose of supplying" telecommunications needed to operate the City's electric system. However, *"this power differs essentially from a power to . . . sell [telecommunications services] to the inhabitants of the city in the ordinary course of trade." See, Id.* (emphasis added). Accordingly, the Commission concludes that LES does not have the legal capacity to provide for-hire contract carrier telecommunications service because the "establishment of a municipal" communications system "for the purchase and sale of [telecommunications] at retail to the inhabitants of the city of Lincoln is not within the power granted to the city council, and that the" LES Resolution 2000-10 "is invalid" as it applies to this application. *See Id.* at 76, 189 N.W. at 653.

LES also claims that it has the ability to engage in "proprietary functions such as providing telecommunications services," based upon a comparison of the power to incorporate a private business under state law "for any lawful purpose." (LES' brief, at p.5). LES' attempt to rely on the general proposition that the "authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances," *see, United Community Services*, 162 Neb. at 794, 77 N.W.2d at 584, fails on three counts.

First, LES does not explain how operating a private telecommunications business is a proper proprietary function of running a public utility electric system. Second, we disagree with LES' analysis of the *United Community Services* case at pages 20-21 of LES' brief. The important point from the *United Community Services* case is that the

Nebraska Supreme Court specifically rejected a "proprietary function" argument exactly like that made by LES in this case, in the Court's holding which relied upon the principles of "Dillon's Rule." *See, United Community Services*, 162 Neb. at 794-795, 77 N.W.2d at 584 (rejecting OPPD's "proprietary function" contentions, in concluding that OPPD, as a public corporation, could not use revenues to make charitable donations because, "[i]n the absence of express statutory authorization . . . the district was without authority to make these contributions"). Third, LES' "proprietary function" argument is contrary to longstanding Nebraska law which provides that "[g]enerel statutory limitations and restrictions upon the powers of a municipality ordinarily apply to proprietary as well as governmental functions." *Neisus v. Henry*, 142 Neb. 29, 41, 5 N.W.2d 291, 298 (1942) (fact that city, in making illegal payments to chairman of board of public works, as manager of light and water plant, in addition to his statutory salary, was engaged in "proprietary function" did not render inapplicable statutory limits on the power of the city to enter into such a contract).

Finally, we have determined that we need not reach the question of whether the City of Lincoln/LES possesses the requisite legal authority to perform for-hire contract carrier telecommunications services is a question of statewide commercial importance. We reach this conclusion because, as the NTA has correctly pointed out, the issue of the legal authority of political subdivisions, in general, to enter the intrastate competitive telecommunications field does present a question of statewide commercial importance, and that issue is already a primary subject of the separate investigatory proceeding, opened by this Commission on October 18, 2000, under Application

No. C-2408/PI-42 (the purpose of investigation is to determine what interim policies and requirements should exist regarding telecommunications contract carriers and applications by political subdivisions with respect to fiber optics).

In conclusion, there is no statute, charter provision or ordinance which either expressly or implicitly grants to LES the power to engage in the for-hire contract carrier telecommunications business. The City of Lincoln's home rule charter grants only *strictly municipal powers* which are strictly construed, and the fact that the provision of telecommunications services for-hire in Nebraska is a subject that pertains to state affairs as distinguished from strictly municipal affairs, means that the provisions of Lincoln's charter must yield to the general laws of the state – general laws which clearly do not grant LES the power to engage in the for-hire contract carrier telecommunications business. Therefore, because LES, as a political subdivision, can exercise no power except such as has been expressly delegated to it, or such as may be inferred from some express delegated power essential to give effect to that power, LES does not have the legal authority to provide for-hire contract carrier telecommunications services.

DECLARATORY RULING AND ORDER

IT IS THEREFORE DECLARED by the Nebraska Public Service Commission that the applicant, the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services, because it lacks the required specific legal authority to do so.

FURTHER, IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that, in light of the applicant's lack of legal authority to provide for-hire contract carrier telecommunications services, this matter should be, and hereby is, dismissed.

MADE AND ENTERED at Lincoln, Nebraska this 9th day of January, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

/s/ Lowell C. Johnson

/s/ Ann C. Boyle

/s/ Rod Johnson

//s// Frank E. Landis

//s// Daniel G. Urwiller

/s/ Frank Landis
Chairman

ATTEST:

/s/ Andy S. Pollock
Executive Director

Concurrence of Commissioner Frank Landis:

The Commission today finds that LES does not have the legal authority to provide for-hire contract carrier telecommunications services. The majority bases their finding on a review of the pertinent statutory provisions and the Lincoln home rule charter. While I concur with the majority's ultimate conclusion that LES lacks the requisite legal authority to provide the intended service, I reach this conclusion following a different path than the one traveled by the majority. For that reason, I write separately.

As a preliminary matter, NTA has asserted that the issue of whether LES possesses the legal authority to provide for-hire telecommunications services is one of "statewide commercial importance." (NTA Brief at 1). In

terms of public policy, I agree that whether governmental entities should be in the business of providing telecommunications services is an issue that will have a large impact on all Nebraskans. This Commission has already taken steps to open dialogue on this question (see Application No. C-2408/PI-42), However, characterizing the case before us as one of "statewide commercial importance" loses sight of the specific, and purely legal, question presented by NTA's motion for declaratory ruling – whether the Lincoln Electric System possesses the *legal* authority to provide for-hire telecommunications services. The sources for any such authority are specific to LES: the statute under which Lincoln may exercise power (Neb. Rev. Stat. § 15-201) is only applicable to cities of the primary class, of which Lincoln is the only one; the home rule charter under which Lincoln is organized is one of only two in the state, and is unique to Lincoln; and the ordinances creating LES obviously bind no other entity. Because of the narrow question before us, our findings today will have no precedential effect on any other similar application by a government entity to provide telecommunications service. Furthermore, any conclusions reached as to LES' or another government entity's legal authority to provide telecommunications services is merely the initial hurdle the applicant must clear. If such authority is ever found in any case, the applicant must still demonstrate to this Commission that they meet our standards of financial, managerial, and technical competency, and that their request is in the public interest.

Regardless as to whether Neb. Rev. Stat. § 15-201 grants LES the legal authority to operate as a contract carrier, I would find that the Lincoln home rule charter

grants sufficiently broad powers to encompass the provision of for-hire telecommunications services. The "limitation of power" scheme which the voters of Lincoln amended their charter to in 1992 is one which grants all powers to the city government, limited only by any express reservation of power or by any inconsistency with the Constitution or laws of Nebraska. Article II, Section 1 of the Lincoln Charter expressly grants the city powers of "every name and nature whatsoever," without specifically precluding Lincoln from providing for-hire telecommunications services. No section of Nebraska law or the Constitution expressly prohibits municipalities from providing telecommunications services.

I disagree with the majority's contention that *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51 (1922), is controlling in this case. It is a very relevant distinction that the charter interpreted in *Consumers' Coal Co.* was a "grant of power" charter, while the present day Lincoln charter takes a "limitation of power" form. And while the majority may be correct in stating that the powers granted by a home rule charter may be overridden by state law (see supra at 11-12), no state laws prohibit municipalities of the primary class from providing for-hire telecommunications services. In fact, LES recognizes that the state laws empowering this Commission to regulate intrastate telecommunications services take precedence over any exercise of their municipal power by coming to this Commission and subjecting themselves to our jurisdiction.

Despite my conclusion that the Lincoln home rule charter authorizes the city of Lincoln to provide for-hire telecommunications services, a proper analysis of the question presented must proceed to a review of the delegation of that power from the City to LES. LES's powers do

not stem directly from the home rule charter. Instead, LES is a creature brought to life by the City through the City's exercise of its own charter powers. The City may bestow on LES those powers it wishes to bestow through properly enacted ordinances, and may likewise place restrictions on LES' powers. No analysis of LES's powers is thus complete without a review of the ordinances governing LES.

LES is governed by the LES Administrative Board under Chapter 4.24 of the Lincoln Municipal Code. Section 4.24.070(a)-(c) addresses the specific powers and duties of the Administrative Board, granting the board the power to fix salaries for employees, purchase materials for use by LES, and other specific powers. Section 4.24.070(d) expressly prohibits LES from exercising certain powers such as setting rates. Finally, Section 4.24.070(e) grants LES the power to "do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System . . . " It is this final subsection which LES contends endows them with the authority to provide for-hire telecommunications services.

Section 4.24.070(e) only allows LES to do those acts "necessary" to operate a municipal electric system. To interpret what powers this subsection authorizes LES to exercise, the language of a city ordinance must be given its plain and ordinary meaning. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 103 (1996).

The word "necessary" has been given several different meanings by various courts, from those who have given it a more rigid meaning, such as "indispensability" or "absolute requirement", see e.g. *State v. Crowdell*, 234 Neb. 469 (1990), *Atkins v. City of Durham*, 186 S.E. 330 (N.C. 1936), *National Docks & N.J.J.C. RY. CO. v. Pennsylvania R.R.*,

33 A. 860 (N.J. Ch. 1896), to those who have given it a more liberal meaning, such as "convenience" or "usefulness", see e.g. *In Re Application No. A-16642*, 236 Neb. 671 (1990), *Baltis v. Village of Westchester*, 121 N.E.2d 495 (Ill. 1954), *Howton v. Howton*, 124 P.2d 837 (Cal. Dist. Ct. App. 1942). Viewing Section 4.24.070 as a whole leads me to conclude that the word "necessary", as used in Section 4.24.070(e), is to be given a more rigid interpretation.

In the leading treatise on municipal corporation law, one commentator has remarked that "the general rule seems to be that where particular powers expressly conferred are followed by a general grant of power, such general grant by intendment may include all powers that are *fairly within* the term of the grant, and that are *essential* to the purposes of the municipal corporation, and *consistent with* the particular powers." ___ McQuillin, Municipal Corporations (3rd Ed. Rev.) § 10.24. (Emphasis added).

The more general grant of power found in Section 4.24.070(e), following the specific grants and limits of Sections 4.24.070(a)-(d), must therefore be read to include only those powers consistent with the more specific grants and those that are essential to LES' purposes – in other words, Section 4.24.070(e) includes those powers related to providing electric power to the people of Lincoln. This reading implies that the word "necessary" must be given a more rigid interpretation. To give the word "necessary" in Section 4.24.070(e) a liberal interpretation would be to turn that section into a grant of virtually unlimited power. If such a construction was intended, the need for any specific grants of power, such as those in Sections 4.24.070(a)-(c), would be obviated.

Reading Section 4.24.070(e) to allow LES to perform those acts nearly "indispensable" or "required" to the operation of an electric system leads me to conclude that LES does not have the legal authority to provide for-hire telecommunications services in Nebraska. The relationship between operating an electric system and operating as a contract carrier of telecommunications services is dubious, and LES has made no assertion that continuance of the former is dependent on initiation of the latter.

Finally, it is my view that if the Lincoln City Council formally adopted an ordinance which specifically authorized the LES Administrative Board to apply for certification as a for-hire contract carrier of telecommunications services, the Administrative Board, under the City's "limitation of power" scheme of governance and barring a specific statutory prohibition, would clearly have the legal authority to do so, and this Commission could then proceed to a judgement of the application on the merits.

/s/ Frank Landis
Commissioner Frank E. Landis

SECRETARY'S RECORD, NEBRASKA
PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC
SERVICE COMMISSION

In the Matter of the Application of Lincoln Electric System, Lincoln, seeking contract carrier permit authority.	)	Application No. C-2400 MOTIONS DENIED Entered: February 21, 2001

BY THE COMMISSION:

OPINIONS AND FINDINGS

By its application filed October 4, 2000, Lincoln Electric System (LES or Applicant) of Lincoln, Nebraska, seeks contract carrier permit authority. Notice of the application appeared in *The Daily Record*, Omaha, Nebraska on October 5, 2000, pursuant to the rules of the Commission. Formal interventions were filed by a number of parties, all of which were made a party to this proceeding.

On November 9, 2000, intervenor, Nebraska Telecommunications Association (NTA) submitted a Motion for Declaratory Ruling challenging LES' legal authority to provide for-hire telecommunications services in the State of Nebraska. The NTA's motion asked the Commission to declare as a matter of law that the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services because it lacks the required legal authority.

A hearing on the NTA motion was held December 11, 2000, in the Commission Hearing Room. Attorneys Jack L. Shultz and Gregory D. Barton appeared on behalf of the NTA. Attorneys Mark J. Ayotte and Douglas L. Curry appeared on behalf of LES. Each party presented their respective arguments on the NTA's Motion for Declaratory Ruling, and the matter was submitted for decision by the Commission at the conclusion of the December 11 oral arguments.

On January 9, 2001, this Commission entered an Order Granting NTA's Motion for Declaratory Ruling. In that order, the Commission determined that there is no statute, charter provision or ordinance that either expressly or implicitly grants to LES the power to engage in the for-hire contract carrier telecommunications business.

Furthermore, the Commission concluded that because LES, as a political subdivision, can exercise no power except such as has been expressly delegated to it, or such as may be inferred from some express delegated power essential to give effect to that power, LES does not have the legal authority to provide for-hire contract carrier telecommunications services.

On January 19, 2001, LES filed a Motion for Rehearing with the Commission requesting that the Commission enter an order granting rehearing in this matter. Soon thereafter, on January 24, 2001, the NTA filed a Motion to Strike Unauthorized Attachments to LES' Motion for Rehearing. As both motions requested oral arguments, an oral argument was held on the motions on January 31, 2001, in the Commission Hearing Room.

After oral arguments and upon review of the briefs filed in this matter, the Commission is of the opinion and

finds that both the Motion to Strike and the Motion for Rehearing should be denied.

The attachments at issue in the Motion to Strike are simply certified copies of the Lincoln Charter, Chapter 4.24 – Lincoln Electric System Administrative Board and LES Resolutions 97-7 and 2000-10. These attachments, while not officially introduced into the record as exhibits, were clearly discussed, at least in part, both in the pleadings filed in this matter and in the oral arguments on the initial Motion for Declaratory Ruling.

The Commission entered the January 9, 2001, order in this matter, based upon all the evidence available to the Commission at that time. To the extent that the attachments mentioned above were not part of the record at that time the decision was rendered, the Commission is of the opinion and finds that they should be accepted into the record at this time.

Nonetheless, the Commission affirms its initial decision in this matter and hereby denies LES' Motion for Rehearing. As discussed above, the Commission has reviewed all of the evidence in this matter and is unpersuaded by LES' Motion for Rehearing. While the Commission has now allowed the record to be supplemented with additional exhibits, the additional evidence has no impact on our decision.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the NTA's Motion to Strike is denied.

IT IS FURTHER ORDERED that LES' Motion for Rehearing is also denied.

MADE AND ENTERED at Lincoln, Nebraska, this 21st day of February, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

/s/ Frank Landis
Chairman

ATTEST:

/s/ Andy S. Pollock
Executive Director

COMMISSIONERS CONCURRING:

/s/ Lowell C. Johnson

/s/ Anne C. Boyle

//s// Frank E. Landis

//s// Daniel G. Urwiller

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February 12, 2003

~~Jon C. Bruning~~
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IN CASE OF: S-01-000286, In re Application of LES, Lincoln v. Ne Cable Communications Assn.

Appellee/ Motion for Rehearing & Brf **filed** 01/21/03.

has been reviewed by the court and the following order entered:

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

(2) (2)

Nos. 02-1591, 02-1599

Supreme Court, U.S.
FILED
MAY 2 3 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

v.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

NEBRASKA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petitions For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the decision of the Nebraska Supreme Court rests on an independent and adequate state law ground, to wit, Respondent City of Lincoln had not properly delegated authority to its operating division, Respondent Lincoln Electric System, to apply for permission to offer telecommunications services as a contract carrier within its existing service area.

PARTIES TO THE PROCEEDINGS

Respondent City of Lincoln (02-1591) is a Nebraska home rule charter city. Respondent Lincoln Electric System (02-1599) is an operating division of the City of Lincoln. Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association (02-1591) are Nebraska nonprofit corporations. Petitioner Nebraska Public Service Commission (02-1599) is an agency of the State of Nebraska.

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OPINIONS BELOW

The decision of the Nebraska Supreme Court is captioned *In re Application of Lincoln Electric System* and is reported at 265 Neb. 70, 655 N.W.2d 363 (2003). In two unreported orders the Nebraska Supreme Court denied Petitioners' motions for rehearing and to stay issuance of the mandate. The decision of the Nebraska Public Service Commission in this proceeding is also unreported. These three unreported decisions are reproduced in the appendices of both petitions.

JURISDICTION

Petitioners timely invoked jurisdiction of this Court under 27 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land . . . .

47 U.S.C. § 253(a) (2000):

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Neb. Rev. Stat. § 86-128(1)(b) (Supp. 2002):

> The commission may only issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and hearing pursuant to commission rules and regulations. The commission shall not issue a certificate or a permit to any agency or political subdivision of the state.

Neb. Rev. Stat. § 86-575(2) (Supp. 2002):

> No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.

RESPONDENTS' STATEMENT OF THE CASE

This case arises against the backdrop of the Telecommunications Act of 1996, Pub. Law 104-104, 110 Stat. 56, which was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers. . . ." H.R. Rep. No. 104-204 at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 11. As this Court has observed,

the Telecommunications Act of 1996 "fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs [local exchange carriers] are subject to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). What the City of Lincoln has sought to do in these proceedings is precisely what Congress intended in the Telecommunications Act of 1996 – to expand the competitive telecommunications offerings available to consumers within its market area. To date, the City has been unsuccessful, not because of federal law, but because of an unduly restrictive interpretation of its municipal powers under Nebraska law.

The City of Lincoln's Home Rule Charter Provides the City with a Broad Grant of Power

Under Article XI, § 2 of the Nebraska Constitution, cities with a population over 5,000 may adopt a charter for their municipal governments. The City of Lincoln is one of two cities in Nebraska which has adopted a home rule charter.[1] As the Nebraska Supreme Court has explained:

> The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field.

[1] The other is Omaha.

Axberg v. City of Lincoln, 141 Neb. 55, 58, 2 N.W.2d 613, 614-15 (1942). The only limit on a home rule charter is that the City remains subject to the constitution and laws of the State of Nebraska.

In 1992, the City of Lincoln amended its home rule charter to change it to a "limitation of power" model of charter from a "grant of power" model. The Lincoln City Charter now provides:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the Constitution of the State of Nebraska, except as prohibited by the State Constitution or restricted by this Charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The City shall also have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this Charter.

City of Lincoln Charter, Art. II, Sec. 1.

The "limitation of power" model the City of Lincoln adopted conformed to the distinction the Nebraska Supreme Court made in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd*, 275 U.S. 504 (1927). In that decision, the court described the differences between the limitation and grant of powers models of charters:

> It is within the competency of the electorate of a city to adopt a charter in any form it may deem proper within the limits specified in the Constitution; it may take the form of a grant or a limitation of powers; in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted to the city government except those expressly or impliedly withheld.

Id. at 248, 207 N.W. at 174 (quotation omitted). With the 1992 charter amendments, the City of Lincoln obtained the right to exercise *all* municipal powers available to it under Nebraska law. It was under this expanded authority that the City of Lincoln, through its Lincoln Electric System ("LES"), sought to increase its service offerings to customers in its market area.

Proceedings Before the Nebraska Public Service Commission

In October 2000, LES filed an application requesting a permit from the Nebraska Public Service Commission ("NPSC"), asking NPSC to authorize LES to provide telecommunications services for hire. An operating division of the City of Lincoln, LES is a municipal utility that provides electric service to customers within a 190-square mile area in and around Lincoln. Its existing network of transmission lines had unused fiber optic capacity, and LES sought permission to put that capacity to productive use as a telecommunications contract carrier.

Petitioner Nebraska Telecommunications Association ("NTA") was one of the 30 intervenors in the LES proceeding. (*See* Petition in 02-1591 at A-25-26.) Petitioner NTA then moved for a declaration that LES did not have

express or implied authority under either state law or the Lincoln City Charter to provide for-hire telecommunications services.

NPSC agreed with the NTA on both grounds and dismissed LES' application to provide telecommunications services for hire. The agency held that no state statute authorized LES to provide telecommunications services for hire. NPSC also reached the same conclusion regarding the Lincoln City Charter, finding no express grant of power to LES "to engage in the for-hire telecommunications business." (*See* Petition in 02-1591 at A-34.) One member of NPSC concurred in the result, finding that while the Lincoln City Charter permitted the City to offer for-hire telecommunications services, the Lincoln City Council had not properly delegated that authority to LES. (*See* Petition in 02-1591 at A-48, A-51.)

Decision of the Nebraska Supreme Court

LES appealed the agency's decision to the Nebraska Supreme Court. While LES' appeal was pending, the Nebraska Legislature addressed the statutory vacuum NPSC said existed in state law. Bowing to intense lobbying from the private telecommunications industry, the legislature enacted 2001 Neb. Laws, L.B. 827. This act provided that NPSC "shall not issue . . . a permit . . . to an agency or political subdivision of the state," nor shall any "agency or political subdivision of the state . . . provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier."[2] Petitioner NTA,

[2] These provisions are currently codified at Neb. Rev. Stat. § 86-128(1)(b) and § 86-575(2) (Supp. 2002). For convenience, the provisions

(Continued on following page)

appellee below, moved to dismiss LES' appeal based on the prohibitions that L.B. 827 imposed. LES opposed NTA's motion on the ground L.B. 827 was preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253(a) (2000). Though LES duly notified the Nebraska Attorney General of its constitutional challenge to L.B. 827, the Attorney General neither entered an appearance nor filed a brief in the Nebraska Supreme Court. *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 74-75, 655 N.W.2d 363, 368 (2003).

The Nebraska Supreme Court affirmed NPSC's decision to dismiss LES' application. The state supreme court premised its affirmance on its interpretation of state municipal law. To reach that conclusion, however, the court first had to address LES' preemption challenge to the recently enacted statutory prohibition against municipal telecommunications services found in L.B. 827. Its preemption analysis was reasoned and thorough. The court discussed the import to this case of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which held that where Congress intends to change the balance between the federal government and the states, Congress must make its intent "'unmistakenly clear.'" 265 Neb. at 77, 655 N.W.2d at 370. The court then reviewed in detail the reasoning of the principal decisions that addressed the preemptive effect of 47 U.S.C. § 253(a). Having a "concurrent duty to enforce federal law," the court concluded that based on the rule of statutory construction set out in *Salinas v. United States*, 522 U.S. 52 (1997), "Congress' use of the phrase 'any entity' in § 253(a) is indicative of an

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at issue here will be referred to by their legislative bill number "L.B. 827."

expansive scope which includes a governmental entity, such as a municipally-owned utility, seeking to provide telecommunications services." *Id.* at 79, 80, 655 N.W.2d at 371, 372. Because L.B. 827 did not fall within the safe harbors provided by 47 U.S.C. §§ 253(b) or (c), the court held that federal law preempted L.B. 827. *Id.* at 80, 655 N.W.2d at 372.[3]

The court's preemption holding was only the first part of its disposition of LES' appeal. Although LES prevailed on the preemption issue, LES still had to establish its authority under state municipal law to offer telecommunications services on a for-hire basis. On this point the Nebraska Supreme Court ultimately agreed with NPSC.

The municipal law question centered first on what powers the Lincoln City Charter conferred on LES to offer telecommunications services for hire. Petitioners argued to the supreme court that a legislative grant of municipal power must be interpreted under the doctrine of strict construction known as Dillon's Rule.[4] While that rule may have once applied to the Lincoln City Charter, the court believed the 1992 revisions to the Lincoln City Charter took it outside the strict construction Dillon's Rule would impose. *Id.* at 83, 655 N.W.2d at 374. Instead, the question was whether the broad authorization of powers found in the Lincoln City Charter included the authority for the

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[3] There are three petitions for certiorari (02-1238, 02-1386 and 02-1405) pending for review of the ruling of the Eighth Circuit Court of Appeals in *Missouri Municipal League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002).

[4] The doctrine is named after legal scholar and jurist John F. Dillon. *See* 2A Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 10.09 at n.6 (3d ed.)

City to provide telecommunications services for hire. Following its prior precedent in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd*, 275 U.S. 504 (1927), in which the City of Lincoln was held authorized to sell gasoline and oil, the court concluded that providing telecommunications services for hire served a sufficiently public purpose to be within the City of Lincoln's municipal powers. 265 Neb. at 86-87, 655 N.W.2d at 375-76.

Nevertheless, while rejecting NPSC's interpretation of Nebraska municipal law governing the power of home rule charter cities, the Nebraska Supreme Court agreed with NPSC that the Lincoln City Council had failed legislatively to delegate its available authority to LES. Though LES had clear authorization to provide electrical service, the court saw nothing in the record to support a finding that provision of telecommunication services was "*necessary* to the efficient operation of the electric system." *Id.* at 88, 655 N.W.2d at 377 (emphasis in original). Thus, the Nebraska Supreme Court concluded, "the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services." Accordingly, the court affirmed the dismissal of LES' application. *Id.*, 655 N.W.2d at 377.

Following the ruling, Petitioner NTA moved for reconsideration and then to stay issuance of the court's mandate. NPSC, appearing for the first time through the Nebraska Attorney General, likewise moved to stay issuance of the mandate. Respondent objected to NPSC's request on the ground that, although NPSC was listed on the caption of the court's opinion as an appellee, NPSC was not certified as a party on LES' appeal and had merely functioned as the tribunal in the proceedings that LES

had appealed. *See* Appellant's Objection to Nebraska Public Service Commission Request to Stay Issuance of Mandate, dated February 22, 2003, at 1-2. Moreover, the Attorney General had not earlier seen fit to respond to LES' constitutional challenge to L.B. 827, despite receiving the required notice of LES' challenge.[5] The court denied without opinion NTA's motion for reconsideration, as well as the motion to stay issuance of the mandate that NTA and NPSC had filed. (*See* Petition in 02-1591 at A-57, Petition in 02-1599 at A-25, A-26.)

REASONS FOR DENYING THE WRIT

I. The Decision below Rests on an Adequate and Independent State Law Ground

The Nebraska Supreme Court reached three principal conclusions in its decision. First, the court held that 47 U.S.C. § 253(a) preempted L.B. 827. Second, the Lincoln City Charter authorized the City of Lincoln to provide telecommunications services for hire. But the Nebraska Supreme Court nevertheless affirmed NPSC because the court ruled that the Lincoln City Council had failed to

[5] Indeed, there is no provision in the state law governing appeals that authorizes NPSC to be a party in any appeal of its decision when, as here, it was acting as a neutral tribunal. In fact, Nebraska's Administrative Procedures Act, though not fully applicable, would suggest the contrary. Neb. Rev. Stat. § 84-917(2)(a) (Supp. 2002) ("if an agency's only role in a contested case is to act as a neutral fact finding body, the agency shall not be a party of record."); *cf. Karnes v. Wilkinson Mfg. Co.*, 220 Neb. 150, 152, 368 N.W.2d 788, 789 (1985) (Tax Commissioner was not a "person aggrieved" by decision of state board of equalization and hence lacked standing under 84-917 to appeal).

properly delegate authority to LES to use its excess fiber optic capacity to provide telecommunications services for hire.

When a state court decision rests on both federal and state law questions, this Court will defer reviewing the federal question if the state court's judgment rests on independent and adequate state law grounds. *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). As stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945):

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

This principle is also premised on this Court's respect for the independence of state courts. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). A straightforward application of this principle leaves no doubt that the decision below affirming the dismissal of LES' application rests on an adequate and independent state law ground.

The Nebraska Supreme Court was forced to address the preemption question because the legislature enacted L.B. 827 while LES' appeal was pending. Having resolved

the preemption question in LES' favor, however, the court then had to address the remaining state law questions. While the court rejected NPSC's interpretation of the City's home rule charter, it nevertheless affirmed the agency's decision to dismiss LES' application because of the absence of express city council authorization to LES to provide telecommunications services.

Though only a comparatively short part of its opinion, the court's reasoning on city council authorization is critical. While the court first stated that "LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area," 265 Neb. at 88, 655 N.W.2d at 377, the court disagreed that LES was authorized to use its facilities to provide other services. Instead, the Nebraska Supreme Court reasoned: "However, use of LES' facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city." *Id.*, 655 N.W.2d at 377. Thus, the court concluded:

> The record does not reflect that the use of excess fiber optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services.

Id., 655 N.W.2d at 377 (emphasis in original).

The independence of the state court decision is beyond peradventure, as the Nebraska Supreme Court did not need to refer to federal law when analyzing the issue of

city council authorization to LES. Likewise, there is absolutely no implied reliance on federal law in the holding that LES lacked authorization from the Lincoln City Council to provide telecommunications services for hire. The court simply reasoned that the City's existing authorization to LES to provide electrical service was insufficient to authorize LES to provide for-hire telecommunications services.

There is also no dispute that the court's delegation ruling was adequate to support the judgment below. The court's affirmance of NPSC's dismissal of the LES application was final on that basis alone. Tellingly, Petitioners gloss over this aspect of the supreme court's decision, relegating it to a passing footnote reference. (*See* Petition in 02-1591 at 8 n.3; Petition in 02-1599 at 6 n.5.) Because the decision below is so plainly one resting on an independent and adequate state law ground, that reason alone compels denying the petitions.

II. The Nebraska Supreme Court Correctly Applied this Court's Preemption Precedents

To obtain review, Petitioners urge that 47 U.S.C. § 253(a) alters the constitutional balance between the states and the federal government if it is read to preempt state regulation of telecommunications activities by municipalities. Petitioners contend that courts must first apply the "plain statement rule" from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), before concluding that section 253(a) does, in fact, preempt such state action. In enacting section 253(a), Petitioners claim that Congress failed to satisfy the *Gregory* decision, because Congress did not specifically note that municipalities fall within the broad

meaning of "any entity." Because section 253(a) expressly preempts conflicting state law – unless the safe harbors of sections 253(b) or (c) apply – the only dispute that Petitioners present under *Gregory* is whether "any entity" actually means all types of entities, or whether that provision must be read to exclude entities owned by cities or other political subdivisions of a state. By ignoring the fundamental precepts of *Gregory* and its progeny, Petitioners erroneously conclude that the Nebraska Supreme Court's decision was inconsistent with this Court's prior preemption decisions.

In *Gregory*, the Court addressed whether the federal Age Discrimination in Employment Act of 1967 (ADEA) prohibited the State of Missouri from imposing mandatory retirement on state judges based on age. *Id.* at 455. The Court recognized that enforcing the ADEA in favor of Missouri's constitutional officers imposed federal regulation on matters traditionally left to the states, but it did not doubt that the federal government could upset the usual constitutional balance of federal and state powers. *Id.* at 460. Rather, the Court merely found that federal involvement in a matter of traditional state concern is "a power that we must assume Congress does not exercise lightly." *Id.* As a result, the Court directed that courts "be certain of Congress' intent before finding that federal law overrides this balance." *Id.* (quotation omitted).

The Court reasoned in *Gregory* that a "plain statement rule" was necessary because "'[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Id.* at 461 (quoting *Will v. Michigan Dept. of State*

Police, 491 U.S. 58, 65 (1989)) (other quotation omitted). But *Gregory* did not establish a talismanic approach, as the Court itself characterized the rule as "nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* Applying this rule to the ADEA and appointed judges, the Court found that Congress' intent regarding enforcement of the ADEA in favor of the judges was "at least ambiguous," given that most other public officials were excluded from the ADEA's protection. *Id.* at 470. Consequently, the plain statement rule was not satisfied. *Id.* As the Court's analysis illustrates, the *Gregory* inquiry concerns only whether Congress' intent was clear.

More recently, the Court applied this rule to a federal statute worded similarly to section 253(a). In *Salinas v. United States*, 522 U.S. 52 (1997), the Court addressed whether a federal bribery statute, which by its terms applied to "any business transaction," actually applied only to bribes affecting federal funds. The Court rejected the defendant's attempt to narrow the obviously broad scope of the law, finding that "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose a narrowing construction." *Id.* at 57 (citations omitted). The Court specifically noted that in applying the *Gregory* standard, a "statute can be unambiguous without addressing every interpretative theory offered by a party." *Id.* at 60. Thus, the Court held that the proper inquiry is simply whether it is "plain to anyone reading the Act that the statute encompasses the conduct at issue." *Id.* (citation omitted).

Applying this standard to the federal statute before it, the Court in *Salinas* concluded that "[t]he text of [the bribery statute] is unambiguous on the point under construction here" and thus "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." *Id.* As *Salinas* illustrates, this Court has found that the use of "any" as a modifier is sufficiently clear to satisfy the *Gregory* plain statement rule. *See also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

The decision of the Nebraska Supreme Court is perfectly consistent with these precedents. On its face, *Gregory* supports the decision of the Nebraska Supreme Court. No ambiguity exists in section 253(a) that remotely resembles the ADEA provision addressed in *Gregory*. Section 253(a) makes no exceptions and creates no confusion as to its reach: "*No State or local statute or regulation*, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (2000) (emphasis added). An objective reading of this provision leaves no question that Congress intended to preempt *all* state regulation of entry into the telecommunications service industry by *any* entity. A narrower reading, such as that suggested by Petitioners, is contrary to the expansive language Congress used and would "press statutory construction to the point of disingenuous evasion [of] a constitutional question." *Salinas*, 522 U.S. at 60 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996)). The statute's plain text leaves no doubt that Congress intended to insert

the federal power into this traditional state concern and, thus, the Nebraska Supreme Court properly applied this Court's *Gregory* principle.

The *Salinas* decision confirms the Nebraska Supreme Court's proper adherence to this Court's precedent. As in *Salinas*, the Nebraska Supreme Court faced a federal statute in which Congress clearly sought the broadest reach possible by employing the modifier "any" before the word "entity." Petitioners attempt to obscure this clarity by arguing that Congress *could have* intended to exclude municipalities from the meaning of "any entity." But as illustrated in *Salinas*, the approach to statutory interpretation used in *Gregory* is not a license to create an ambiguity simply by raising *possible* varying interpretations of a federal statute.[6] *Salinas*, 522 U.S. at 60 ("[A statute] need only be plain to anyone reading the Act that the statute encompasses the conduct at issue.") (quotation omitted). Thus, in *Salinas* the Court found no ambiguity in Congress' command when it used the term "any" and, accordingly, concluded that the bribery statute did not offend the *Gregory* principle. It follows that the Nebraska Supreme Court properly found that the plain statement rule does not preclude Congress' clear intent to preempt state regulation in this area of traditional state governance.

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[6] Indeed, Petitioners' focus on creating an ambiguity in the particulars of section 253(a) is misplaced; the plain statement rule does not require congressional precision with respect to statutory details. *See Gregory*, 501 U.S. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (observing that the Court historically applied the plain statement rule only to "whether Congress intended a particular statute to extend to the States *at all*") (emphasis added).

The Nebraska Supreme Court's decision is also consistent with decisions from the Eighth Circuit Court of Appeals and the Western District of West Virginia on this exact issue. In *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002), various Missouri municipalities and public utilities mounted the same challenge as Petitioners do here – namely, that it is unclear whether Congress intended to include municipalities within the meaning of "any entity" in section 253(a). *Id.* at 953. The Eighth Circuit rejected this argument, holding that "[t]here is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term." *Id.* The court further found that "Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54. The court supported its conclusion with firm reliance on this Court's precedent. *Id.* (quoting *Gonzalez*, 520 U.S. at 5).

Likewise, the court in *City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D.Va. 2001), rejected an attempt to contort the plain meaning of "any entity" in section 253(a). The court found "that the broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be 'entities' within the meaning of the Telecommunications Act." *Id.* at 747. And like the Eighth Circuit, the court concluded that "[s]uch an interpretation is confirmed by the use of the modifier 'any.'" *Id.* The court similarly relied on and applied this Court's precedents, holding "that the use of the modifier 'any' in a federal statute precludes a narrow interpretation of the law's application." *Id.* (citing *Salinas*, 522 U.S. at 57; *Gonzales*, 520 U.S. at 5). As a result, the court found that "it strains logic to interpret the term 'any entity' in § 253(a) to mean

'any entity except for municipalities and other political subdivisions of states.'" *Id.*

The contrary opinion in *City of Abilene v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), does not justify granting the petitions. This decision is an aberration, relying as it does on an ethereal, if not odd, notion of congressional *tone* of voice rather than this Court's clear precedents. *Id.* at 52-53. As noted in *City of Bristol*, notions of tone of voice have no role in statutory interpretation. 145 F. Supp. 2d at 749. Inflections of sincerity, concern, emphasis or even sarcasm simply are not part of the written record that comprises legislative history. The *City of Abilene* court also utterly failed to justify its decision on preemption with Congress' manifest pro-competitive interest in the Telecommunications Act of 1996. Moreover, the most recent decisions reviewing *City of Abilene* have uniformly rejected its reasoning, which suggests that further percolation in the lower courts will properly rectify any conflict in favor of this Court's precedents. *See, e.g., Missouri Mun. League*, 299 F.3d at 954-55; *City of Bristol*, 145 F. Supp. 2d at 749; *In re Application of Lincoln Elec. Sys.*, 655 N.W.2d at 370-72.

Finally, the Court's decision in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), is inapposite. *Raygor* concerned whether 28 U.S.C. § 1367(d) tolled the statute of limitations for claims against non-consenting states that are subsequently dismissed on Eleventh Amendment grounds. *Id.* at 542. Section 1367(d) purported to apply to "any claim," but the Court expressed reservations over reading the statute with such an expansive scope in the absence of clearer congressional intent that it apply to states. *Id.* at 542-44. The Court ultimately found that Congress had not sufficiently expressed its clear intent to have section 1367 apply to the states for

purposes of abrogating their Eleventh Amendment immunity. *Id.* at 544-46.

Raygor is inapposite because there is no question that Congress intended that section 253 apply to the states – the statute in fact *limits* its reach to the states and local government. 47 U.S.C. § 253(a) (2000). Thus, the concerns in *Raygor* that Congress did not sufficiently express its intent to have the statute apply to the states cannot be present here. In short, no further review by this Court is warranted in this case. The Nebraska Supreme Court correctly followed *Gregory* and *Salinas* to enforce the balance between federal and state authority that Congress struck when enacting 47 U.S.C. § 253.

III. Petitioners' Asserted Conflict is Less than It Appears and Does Not Warrant Review of this Case in Any Respect

Petitioners assert that a clear conflict exists between this case and the decision of the District of Columbia Circuit in *City of Abilene*. It is true that the *Missouri Municipal League* and *City of Bristol* line up with this case in opposition to *City of Abilene* and two state cases, one from Iowa and one from Georgia. But this conflict is less than Petitioners urge, and if the lower courts are allowed to address this issue further, is likely to be of limited significance. The Iowa decision, *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), followed close on the *City of Abilene* decision and merely parroted that decision. *Id.* at 252. Significantly, the Iowa Supreme Court did not need to seriously analyze the import of 47 U.S.C. § 253(a), as it held the state statute preempted under another provision of the Telecommunications Act of 1996. *Id.* at 253-54. The Georgia case, *Municipal Elec. Auth. of*

Georgia v. Georgia Pub. Serv. Comm'n, 241 Ga. App. 237, 525 S.E.2d 399 (1999), similarly failed to undertake any meaningful analysis of the preemption question. *See id.* at 241, 525 S.E.2d at 403. Moreover, any administrative issues the FCC may encounter while this difference works out can be resolved by the FCC rejecting the *City of Abilene* decision. Indeed, because the FCC concedes that provisions like L.B. 827 conflict with the congressional purpose in the 1996 legislation, *see In re Missouri Mun. League*, 16 F.C.C.R. 1157, 1163 (2001), it is surprising to see that the FCC is petitioning this Court.[7] *See also In re Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritec Corporation*, 13 F.C.C.R. 19046, 1998 WL 658606 (F.C.C.) ¶ 10, ¶ 16 (1998) (term "entity" should be interpreted broadly to achieve pro-competitive intent of Congress in passing Telecommunications Act of 1996).

In any event, the decision below is far more limited than Petitioners claim. As it came out of the Nebraska Public Service Commission, this case turned simply on the question of whether the home rule charter under which the City of Lincoln operates conferred upon it sufficient power in its own right to seek a contract carrier permit without further state authorization. The Nebraska Supreme Court, having found that the Lincoln City Charter

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[7] Indeed, the FCC's position is that under § 253(a), a state law cannot prevent an independent corporate entity – even though wholly owned by a city or other political subdivision of a state – from offering telecommunications services for hire. 16 F.C.C.R. 1169, ¶ 20. Thus, the position the FCC takes on preemption under § 253(a) depends on the form of the entity a municipality chooses, a position that hardly reflects the federalism concerns expressed in *Gregory*.

was, in fact, a limitations of power charter, concluded that Dillon's Rule, a rule of strict construction, did not apply to it. 265 Neb. at 83, 655 N.W.2d at 374. The broad authorizing language contained in the City charter was, therefore, sufficient to support the application for contract carrier permit authority. Thus, the intervening adoption of L.B. 827 by the Nebraska Legislature was a clear and unequivocal attempt to prohibit an otherwise authorized entity from engaging in the field of telecommunications. It was this prohibitory language of L.B. 827 that was found to be preempted by federal law and thus unconstitutional.

Nor is there cause to hold this case pending review of *Missouri Municipal League*, should this Court grant the FCC's petition for certiorari in 02-1386. The Nebraska Supreme Court may have held L.B. 827 preempted, but the court affirmed NPSC, which had dismissed LES' application as lacking support under state municipal law. Even if this Court reverses the Eighth Circuit decision in *Missouri Municipal League*, the judgment below will be unaffected. If this Court were to reverse the Eighth Circuit, the Nebraska Supreme Court should be allowed to undo its preemption holding in the context of a real, live controversy. Thus, any decision on preemption by the Nebraska Supreme Court in *this* proceeding following a reversal of the Eighth Circuit would be purely advisory.

CONCLUSION

Because the decision below rests on an adequate and independent state ground, the Petitions in 02-1591 and 02-1599 should be denied. Even on the merits, the asserted conflict does not merit review, regardless of whether the issue is reviewed in *Missouri Municipal League*.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
JUN 9 2003
OFFICE OF THE CLERK

No. 02-1599

In The Supreme Court of the United States

NEBRASKA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

LINCOLN ELECTRIC SYSTEM, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

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12 pgs

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REPLY BRIEF

As demonstrated in the Petition, the Nebraska Supreme Court's holding that 47 U.S.C. § 253(a) preempts Nebraska's statutes prohibiting the state's political subdivisions from providing telecommunications services is contrary to decisions of other state and federal courts, who have split on the issue of whether § 253(a) clearly and manifestly demonstrates Congress' intent to preempt state laws which preclude their own political subdivisions from engaging in the telecommunications business. Further, as noted in the Petition, the Nebraska Supreme Court's conclusion that the phrase "any entity" in § 253(a) includes a state's political subdivisions is contrary to decisions of this Court recognizing that such broad, general language is insufficient to establish a clear and manifest intent by Congress to preempt states in the exercise of their historic power to establish the confines and parameters of the activities of their own political subdivisions.

Respondent LES advances several arguments in opposition to granting the petition. First, Respondent appears to contend NPSC was not a "party" to the proceedings below and thus cannot seek review of the Nebraska Supreme Court's decision. (Brief in Opp. at 9-10, 10 n.5). Second, Respondent argues review is not warranted because the decision below rests on an adequate, independent state law ground. (Brief in Opp. at 10-13). Third, Respondent contends the court below correctly applied this Court's preemption precedents. (Brief in Opp. at 13-20). Finally, Respondent contends the "asserted conflict" in judicial decisions interpreting the preemptive effect of § 253(a) with regard to state laws prohibiting the provision of telecommunications services by political subdivisions "is less than it appears" and thus does not warrant review.

(Brief in Opp. at 20-22). None of these contentions provide any basis for denying the Petition.

1. Respondent suggests that NPSC, while designated as a party by the Nebraska Supreme Court, was actually not a party to the proceedings below, but acted as a "neutral tribunal." (Brief in Opp. at 9-10, 10 n.5). LES further appears to imply that the Attorney General's decision not to file an amicus curiae brief in the Nebraska Supreme Court after receiving notice of the constitutional question pursuant to Neb. Sup. Ct. R. of Prac. and Proc. 9E (rev. 2002) somehow impacts NPSC's status as a party or its ability to seek review in this Court. (Brief in Opp. at 9-10).

The Court need look no further than the Nebraska Supreme Court's opinion to reject Respondent's claim that NPSC was not a party to the proceedings below. The Nebraska Supreme Court's caption of the case denominates NPSC as the "Appellee," and NTA as one of the "Intervenor-Appellees." (App. A-1). While NPSC did not file a brief in the Nebraska Supreme Court, and the Attorney General did not file an amicus curiae brief, that has no bearing on whether NPSC was a party to the proceedings below. Not only did the court below recognize NPSC as a party in its decision, it did so in denying NPSC's motion to stay issuance of the mandate, issuing an order again referring to "Appellee PSC." (App. A-25). There is no doubt that NPSC was recognized as a party to the appeal before the Nebraska Supreme Court.

The Nebraska Supreme Court's treatment of NPSC as a party is consistent with its recognition of NPSC as an appellee in other appeals from NPSC to the Nebraska Supreme Court involving orders issued by NPSC, including telecommunications orders. *See, e.g., In re Application*

of Nebraska Public Serv. Comm'n, 260 Neb. 780, 619 N.W.2d 809 (2000) (Listing NPSC as "Appellee" in appeal seeking review of NPSC order directing incumbent local exchange carriers ["ILECs"] to comply with order establishing multidwelling unit ["MDU"] regulations and a statewide policy for access to MDUs by competitive local exchange carriers ["CLECs"]); *In re Application of GCC License Corp.*, 264 Neb. 167, 647 N.W.2d 45 (2002) (Listing NPSC as "Appellee" in appeal seeking to overturn NPSC order designating wireless telecommunications carrier as an eligible telecommunications carrier ["ETC"] under 47 U.S.C. § 214(e)(2)). Indeed, it is somewhat ironic that LES would contend that NPSC is not a party to an appeal of this nature in view of the fact that counsel of record for Respondent is a member of the law firm that represented GCC in the latter case, in which NPSC appeared and filed a brief on behalf of "appellee Nebraska Public Service Commission." 264 Neb. at 168, 647 N.W.2d at 47-48. The Nebraska Supreme Court's decision, as well as these other cases decided by the Nebraska Supreme Court involving appeals of NPSC orders, establish that NPSC was a party to the appeal in the Nebraska Supreme Court. As such, NPSC may seek review by this Court of the Nebraska Supreme Court's decision.

In apparently challenging NPSC's status as a party, Respondent does not discuss Nebraska Supreme Court decisions involving appeals from NPSC orders recognizing NPSC as a party, but instead refers to the provision for judicial review of "contested case" proceedings under Nebraska's Administrative Procedure Act ["APA"], Neb. Rev. Stat. § 84-917 (1999). (Brief in Opp. at 10 n.5). The appeal provisions in Nebraska's APA have no application to appeals from orders entered by NPSC. *Nebraska Public*

Service Comm'n v. Nebraska Public Power Dist., 256 Neb. 479, 486-87, 590 N.W.2d 840, 846 (1999) (Appeal provisions of APA do not apply to NPSC appeals, as the Legislature has provided a specific method of appeal from NPSC pursuant to Neb. Rev. Stat. §§ 75-136 and 75-137 (Cum. Supp. 2002)). Respondent also cites *Karnes v. Wilkinson Mfg. Co.*, 220 Neb. 150, 368 N.W.2d 788 (1985) in support of its claim that NPSC is not properly viewed as a party. (Brief in Opp. at 10 n.5). *Karnes* is inapposite because it concerned application of the review provisions of the APA which, as noted, the Nebraska Supreme Court has held do not apply to NPSC. *Karnes* involved construction of the APA provision allowing a "person aggrieved" by an agency decision to seek judicial review. 220 Neb. at 152, 368 N.W.2d at 789. The Nebraska Supreme Court held that the Tax Commissioner, who was a member of the State Board of Equalization and Assessment, was not a "person aggrieved" who could appeal an order of the State Board, as the "commissioner could hardly have been 'aggrieved' by her own decision." *Id. Karnes* has no application to the instant case, as it involved the limited situation where an individual member of a state board attempted to appeal from a decision of the board, and the Nebraska Supreme Court's finding that, under the specific review statute, an individual board member was not authorized to pursue an appeal. In contrast, the Nebraska Supreme Court has consistently recognized that NPSC is a party to appeals of orders entered by NPSC taken pursuant to §§ 75-136 and 75-137.

Indeed, if NPSC is not a party, then the State of Nebraska would have to be notified of the constitutional question raised in the petition for a writ of certiorari filed by NTA by service of written notice on the Nebraska

Attorney General. Pursuant to 28 U.S.C. § 2403(b), if the constitutionality of a state statute "affecting the public interest" is drawn in question in a federal court proceeding to which the state or an officer or agency thereof is not a party, the court must certify that fact to the state attorney general and shall permit the state to intervene as of right with respect to the question of constitutionality. As applied to proceedings in this Court, § 2403(b) would require that, if NPSC is not a party, the Nebraska Attorney General be notified of the question raising the constitutionality of Nebraska's statutes prohibiting political subdivisions from providing telecommunications services presented by NTA, and the State would be entitled to intervene as a matter of right in this Court to defend the constitutionality of Nebraska law. United States Supreme Court Rule 29.4(c); *see Estate of Thornton v. Caldor, Inc.*, 465 U.S. 1098 (1984), 472 U.S. 703, 708 n.7 (1985). It is not necessary for the State to be noticed and to intervene, however, as NPSC is a party.[1]

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[1] Respondent correctly notes that the Nebraska Attorney General received notice of the constitutional question involved in the appeal pursuant to Neb. Sup. Ct. R. of Prac. and Proc. 9E (rev. 2002), and that the Attorney General did not file an amicus curiae brief in the Nebraska Supreme Court, as permitted by Rule 9E. (Brief in Opp. at 7). NPSC's petition acknowledges this fact. (Petition at 5 n.3). Under Rule 9E, the filing of an amicus curiae brief by the Attorney General is discretionary and, even if the Attorney General participates, it is not in the capacity of a party. The Attorney General's election not to file an amicus curiae brief in the Nebraska Supreme Court when the constitutional issue had been addressed by NTA has no bearing on NPSC's status as a party. Nor would it have any impact on Nebraska's right to intervene and participate in the proceedings in this Court initiated by NTA under Rule 29.4(c) and 28 U.S.C. § 2403(b) in the event NPSC is deemed not to be a party to the proceedings below.

2. Respondent also incorrectly asserts that review should be denied because the Nebraska Supreme Court's decision rests on an adequate and independent state law ground. (Brief in Opp. at 10-13). In a companion petition for a writ of certiorari, two other parties to the proceedings below, the Nebraska Telecommunications Association ["NTA"] and the Nebraska Cable Communications Association ["NCCA"], have also sought review of the Nebraska Supreme Court's erroneous decision that § 253(a) preempts Nebraska's statutes prohibiting political subdivisions such as Respondent from providing telecommunications services for hire. *Nebraska Telecommunications Ass'n, et al. v. City of Lincoln, d/b/a Lincoln Electric System*, No. 02-1591. Petitioners NTA and NCCA have fully addressed Respondent's erroneous claim that the Court should decline review on this basis. (Reply Brief for Petitioners NTA and NCCA, Case No. 02-1591, at 2-6). Petitioner NPSC joins in the arguments advanced by NTA and NCCA urging the Court to reject Respondent's claim that an adequate and independent state law ground justifying denial of review is present in this case.

3. Respondent further contends review should be denied because the Nebraska Supreme Court correctly applied the Court's preemption precedents, particularly, the "plain statement" rule set forth in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). (Brief in Opp. at 13-15). Respondent also asserts the decision of the court below is consistent with the Court's decisions in *Salinas v. United States*, 522 U.S. 52 (1997) and *United States v. Gonzales*, 520 U.S. 1 (1997). (Brief in Opp. at 15-18).

Contrary to Respondent's claim, the Petition demonstrates that the Nebraska Supreme Court's opinion conflicts with decisions of this Court recognizing that the use

of broad general language such as the phrase "any entity" in § 253(a) is insufficient to provide the "plain statement" required to "clearly" and "manifestly" express Congress' intent to alter the usual balance of federal and state powers by limiting the states' historic power to establish the confines and parameters of the activities to be engaged in by their own political subdivisions. (Petition at 12-19). Moreover, as explained in the petition filed by NTA and NCCA, Respondent's claim that the Court's decisions in *Salinas* and *Gonzales* support the holding of the court below is incorrect, because "[n]either *Salinas* nor *Gonzales* involved a substantive application of the 'plain statement' rule to an ambiguous federal statute which 'could be' read as invading the traditional powers historically reserved to the States." (Petition of NTA and NCCA, Case No. 02-1591, at 17). The Nebraska Supreme Court's erroneous application of this Court's precedents merits review.

4. Finally, Respondent asserts that review is not warranted because the decisional conflict cited by Petitioners "is less than it appears." (Brief in Opp. at 20). Respondent even goes so far as to suggest that the FCC may deal with the conundrum it faces by virtue of the conflict presented by the Eighth Circuit's decision in *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) and the D.C. Circuit's contrary opinion in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) by simply "rejecting" the decision in *City of Abilene*. (Brief in Opp. at 21).

Respondent's attempt to minimize the clear decisional conflict involving the question presented must be rejected. This case, like *Missouri Municipal League*, squarely presents an important question of federal law on which lower courts have reached differing conclusions which only

this Court can definitively resolve. Absent final resolution by this Court of the question of whether § 253(a) manifests a clear intent by Congress to prohibit states from barring their political subdivisions from engaging in providing telecommunications services, the answer to this question will be different, depending on the jurisdiction in which it is raised. The importance of this question, and the difficulty presented by the conflicting decisions it has generated, is obvious in light of the petition for writ of certiorari filed on behalf of the United States and the FCC seeking review of the Eighth Circuit's decision in *Missouri Municipal League*. The goal of uniform application of federal law cannot be achieved if review is not granted.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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June 2003